Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit, in conflict with other circuits, and in disregard of this Court's decisions in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), and *United States* v. *Bestfoods*, 524 U.S. 51 (1998), correctly held that the forum contacts of a subsidiary corporation may be used to find *in personam* jurisdiction over its parent company even though there is no basis for piercing the corporate veil.

2. Whether the Eighth Circuit, in conflict with other circuits and in disregard of this Court's decisions, correctly held that the due process limits on *in personam* jurisdiction are

(a) properly determined by using an unstructured, multi-factor balancing test that fails to distinguish adequately between "specific" and "general" jurisdiction, fails to treat the threshold inquiry into the defendant's "minimum contacts" with the forum as distinct from an evaluation of fairness considerations, and gives little or no weight to the "procedural and substantive policies of other nations" and the "unique burdens" imposed on foreign defendants compelled to defend litigation in American courts (*Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 115 (1987)); and

(b) not offended by a State's exercise of long-arm jurisdiction over a non-U.S. manufacturer that lacks contacts of its own with the forum, in a product liability action in which the plaintiff is not a resident of the forum State; the alleged injuries occurred outside of the forum; and the plaintiff's claims arise out of the design, manufacture, and sale of a product in a foreign country.

RULE 29.6 STATEMENT

Petitioner Dassault Aviation has a parent corporation, Groupe Industriel Marcel Dassault, which owns 50.02% of Dassault Aviation's stock. The remaining stock is held by EADS (European Aeronautics Defense & Space Co.) – France (45.94%) and by private investors (4.04%). No publicly held corporation owns 10% or more of Dassault Aviation's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Factual Background 2

B. Proceedings in the Trial Courts 3

C. The Court of Appeals' Decision 6

REASONS FOR GRANTING THE PETITION 8

I. The Decision Below Conflicts With Decisions Of This Court And The Lower Courts And Raises Important And Recurring Issues 12

A. The Eighth Circuit's Approach To Attributing A Subsidiary's Forum Contacts To A Parent Company 12

B. The Eighth Circuit's Multi-Factor Balancing Test 17

TABLE OF CONTENTS—Continued

Page

C. The Issues Raised Are Important And Recurring 23

II. The Decision Below Is Incorrect 24

III. This Case May Also Provide An Opportunity To Clarify The "Stream Of Commerce" Theory 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page(s)**

Aftanase v. *Economy Baler Co.*,
343 F.2d 187 (8th Cir. 1965) 20, 22

Alpine View Co. v. *Atlas Copco AB*,
205 F.3d 208 (5th Cir. 2000) 14

Amoco Egypt Oil Co. v. *Leonis Navigation Co.*,
1 F.3d 848 (9th Cir. 1993) 21

Asahi Metal Indus. Co. v. *Superior Court*,
480 U.S. 102 (1987) ..... *passim*

Bearry v. *Beach Aircraft Corp.*, 818 F.2d 370
(5th Cir. 1987) 30

Berkey v. *Third Ave. Ry. Co.*, 155 N.E. 58
(N.Y. 1926) 25

Bridgestone Corp. v. *Lopez*, 131 S.W.3d 670
(Tex. Ct. App. 2004) 16

Brunswick Corp. v. *Suzuki Motor Co., Ltd.*,
575 F. Supp. 1412 (E.D. Wis. 1983) 17

Burger King Corp. v. *Rudzewicz*,
471 U.S. 462 (1985) ..... *passim*

Burnham v. *Superior Court*, 495 U.S. 604 (1990) 9, 25

Cannon Mfg. Co. v. *Cudahy Packing Co.*,
267 U.S. 333 (1925) ..... *passim*

Carnival Cruise Lines, Inc. v. *Shute*,
499 U.S. 585 (1991) 9

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836 A.2d 1113 (R.I. 2003) 20, 21

TABLE OF AUTHORITIES—Continued

Page(s)

Clune v. *Alimak AB*, 233 F.3d 538 (8th Cir. 2000), cert. denied, 533 U.S. 929 (2001) 7-8

Coca-Cola Co. v. *Procter & Gamble Co.*, 595 F. Supp. 304 (N.D. Ga. 1983) 14

Consolidated Development Corp. v. *Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000) 13

Covia v. *Robinson*, 507 N.W.2d 411 (Iowa 1993) 20

Daimler-Benz Aktiengesellschaft v. *Olson*, 21 S.W.3d 707 (Tex. Ct. App.), rev. denied, 53 S.W.3d 308 (Tex. 2000), cert. denied, 535 U.S. 1077 (2002) 16

DaimlerChrysler Aktiengesellschaft v. *Olson*, 535 U.S. 1077 (2002) 23

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Dehmlow v. *Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992) 29

Dole Foods Co. v. *Patrickson*, 538 U.S. 468 (2003) 25

Donatelli v. *Nat'l Hockey League*, 893 F.2d 459 (1st Cir. 1990) 19

Energy Reserves Group, Inc. v. *Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978) 16

Ensign v. *Bank of Baker*, 676 N.W.2d 786 (N.D. 2004) 20

TABLE OF AUTHORITIES—Continued

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ESAB Group, Inc. v. *Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997), cert. denied, 523 U.S. 1048 (1998) 21

F. Hoffmann-La Roche Ltd. v. *Empagran*, 124 S. Ct. 2359 (2004) 11, 19

Gallagher v. *Mazda Motor of Am.*, 781 F. Supp. 1079 (E.D. Pa. 1992) 14

Gray v. *Riso Kagaku Corp.*, 1996 WL 181488 (4th Cir. Apr. 17, 1996) 13-14

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Guardian Royal Exch. Assurance, Ltd. v. *English China Clays, P.L.C.*, 815 S.W.2d 223 (Tex. 1991) 21

Hansen v. *Scott*, 645 N.W.2d 223 (N.D. 2002), cert. denied, 537 U.S. 1108 (2003) 20

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I.A.M. Nat'l Pension Fund v. *Wakefield Indus., Inc.*, 699 F.2d 1254 (D.C. Cir. 1983) 13

In re Telectronics Pacing Systems, Inc., 953 F. Supp. 909 (S.D. Ohio 1997) 14

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Page(s)

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Keeton v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984) 25-26

Kerry Steel, Inc. v. *Paragon Indus., Inc.*, 106 F.3d 147 (6th Cir. 1997) 21

Land-O-Nod Co. v. *Bassett Furn. Indus., Inc.*, 708 F.2d 1338 (8th Cir. 1983) 22

Lee v. *Goshen Rubber Co.*, 635 N.E.2d 214 (Ind. App. 1994) 20

Lesnick v. *Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994), cert. denied, 513 U.S. 1151 (1995) 29

McInnis v. *Daniel*, 535 U.S. 1077 (2002) 23

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OMI Holdings Inc. v. *Royal Ins. Co.*, 149 F.3d 1086 (10th Cir. 1998) 20

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Pennoyer v. *Neff*, 95 U.S. 714 (1877) 9

Purdue Research Found. v. *Sanofi-Synthelabo, S.A.*, 338 F.3d 773 (7th Cir. 2003) 21

TABLE OF AUTHORITIES—Continued

Page(s)

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Shaffer v. *Heitner*, 433 U.S. 186 (1977) 25

Southern Co. v. *Alderson*, 535 U.S. 1090 (2002) 23

Sutherland v. *Brennan*, 901 P.2d 240 (Or. 1995) 20

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Vermeulen v. *Renault U.S.A., Inc.*, 985 F.2d 1534 (11th Cir.), cert. denied, 508 U.S. 907 (1993) 30

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Wells Fargo & Co. v. *Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977) 16

Wessels, Arnold & Henderson v. *National Medical Waste, Inc.*, 65 F.3d 1427 (8th Cir. 1995) 22

Westinghouse Elec. Corp. v. *Superior Court*, 551 P.2d 847 (Cal. 1976) 15

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TABLE OF AUTHORITIES—Continued

Page(s)

Statutes:

Ark. Code Ann. § 16-4-101.B 1

28 U.S.C. § 1257 22

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T. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (2000) 10

Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on* Asahi Metal Indus. Co. *v.* Superior Ct. of Cal., 1987 DUKE L.J. 669 20

TABLE OF AUTHORITIES—Continued

Page(s)

McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended The Limits Of Due Process*, 84 B.U. L. REV. 491 (2004) 23

McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753 (2003) 9, 22

Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807 (2004) 22

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Eighth Circuit (App., *infra*, 1a-9a) is reported at 361 F.3d 449. The order denying rehearing (App., *infra*, 30a) is unreported. The opinion of the United States District Court for the Eastern District of Arkansas dismissing the complaint for lack of personal jurisdiction (*id.* at 10a-21a) is also unreported. The order of the United States District Court for the Western District of Michigan granting dismissal in a related case (*id.* at 22a-23a), and that court's prior related opinion (*id.* at 24a-29a), are both unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2004, and rehearing was denied on April 9. App., *infra*, 1a, 30a. Justice Thomas extended the time for filing a petition for a writ of certiorari until August 17, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides, in pertinent part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The Arkansas long-arm statute, Ark. Code Ann. § 16-4-101.B, authorizes the exercise of personal jurisdiction "to the maximum extent permitted by * * * the Fourteenth Amendment of the United States Constitution."

STATEMENT

This case raises important issues of constitutional law that are litigated with great frequency in federal and state courts across the country. It also presents a valuable opportunity for this Court to provide much-needed clarification concerning the limits imposed by due process on the power of a State, through its long-arm statute, to exercise *in personam* jurisdiction over a nonresident defendant (especially, as in this case, a non-U.S. corporation). In the decision below, a panel of the Eighth Circuit held that Arkansas may hale a French manufacturer into

court to defend a product liability action, even though the French company has *no* contacts in its own right with the State; the product involved in the accident was designed, manufactured, and sold across the Atlantic; and the claims arise out of injuries allegedly suffered outside of Arkansas by a nonresident. The court of appeals was able to reach that flawed result only by relying on the Arkansas contacts of petitioner's wholly owned U.S. subsidiary, even though (as the court of appeals acknowledged) there was no basis for piercing the corporate veil. The Eighth Circuit's far-reaching and mistaken jurisdictional holding – which conflicts in multiple respects with the decisions of this Court and other circuits, but which finds support in the decisions of various state courts – warrants review.

A. Factual Background

This case arises out of injuries allegedly suffered by respondent Beverly Anderson, a Michigan resident, while working as a flight attendant for the Amway Corporation, a Michigan corporation, on a jet owned by that company. The injuries occurred when the jet underwent a series of pitch oscillations as it descended into an airport in Michigan at the conclusion of a flight originating in Oregon. App., *infra*, 10a-11a. The jet was manufactured in France by petitioner Dassault Aviation (Dassault) and sold there to petitioner's wholly owned U.S. subsidiary, Dassault Falcon Jet Corp. (Falcon Jet), which serves as petitioner's exclusive distributor in the Western Hemisphere. *Id.* at 1a-2a, 5a. Falcon Jet, though headquartered in New Jersey, operates a large facility in Arkansas, where it paints and adds furnishings and optional avionics to the jets it sells according to the specifications of its customers. *Id.* at 3a, 6a, 11a; C.A. App. 50.

Title to the jet passed in France, and Falcon Jet flew the airplane "green" – an industry term used to describe the primer coat of paint before a jet is painted and outfitted – to Arkansas. App., *infra*, 19a. At its Arkansas facility, Falcon Jet "completed" the airplane for sale to Amway. *Id.* at 2a, 11a, 19a. According to Anderson's complaint, the aircraft's oscillations were

caused by a defective autopilot – a component made by Honeywell, Inc., a corporation headquartered in New Jersey at the time this suit was filed, and installed by Dassault in France. *Id.* at 1a-2a; C.A. App. 1-4.

B. Proceedings in the Trial Courts

1. Anderson filed a product liability action in the Western District of Michigan, naming as defendants Honeywell, Falcon Jet, and petitioner Dassault. App., *infra*, 2a, 11a. The district court dismissed the case against Dassault for lack of personal jurisdiction (*id.* at 22a-29a), holding that Anderson had not "met her burden of establishing that Dassault had sufficient contacts in Michigan to fall within the long-arm statute" and, "[e]ven if she had, constitutional considerations" would preclude the exercise of *in personam* jurisdiction over Dassault there. *Id.* at 29a.

The court rejected Anderson's submission that "it should disregard the formal corporate separation between Dassault and * * * Falcon [Jet]" and attribute Falcon Jet's alleged contacts with Michigan to its parent. App., *infra*, 27a. "[M]ere ownership of the subsidiary," the court explained, "is insufficient" because "a parent company will *always* exercise some amount of control" over a subsidiary. *Id.* at 26a. Thus, to attribute Falcon Jet's contacts to Dassault, Anderson "must demonstrate an alter-ego relationship or an undue amount of control." *Id.* at 26a. "Even though Dassault Falcon was the exclusive distributor of Dassault's aircraft, and the two companies may have shared common members between the two boards of directors[,] that is insufficient to create personal jurisdiction over Dassault." *Ibid.*

Next, the district court noted that both the Sixth Circuit and the Michigan courts had "set forth three criteria that must be met before a court will exercise personal jurisdiction" in the face of a due process challenge:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant

> must have a substantial enough connection with the forum state to make the exercise of jurisdiction * * * reasonable.

App., *infra*, 27a. There was no need to consider all three factors, the court reasoned, because Anderson "cannot meet the first criterion." *Id.* at 28a. "[T]hat a Dassault-manufactured product was sold to a corporation in Michigan and allegedly caused an accident in the airspace over Michigan is not enough to meet the purposeful availment requirement." *Id.* at 28a-29a.

2. Anderson next initiated this litigation against Dassault in the Eastern District of Arkansas. App., *infra*, 12a. In response to Dassault's motion to dismiss for lack of personal jurisdiction, Anderson argued that the district court could exercise both "general" and "specific" jurisdiction over Dassault.[1] Rejecting Anderson's submission, the Arkansas district court, like the Michigan court, dismissed the case for lack of personal jurisdiction. *Id.* at 10a-21a.

The court first noted that Arkansas's long-arm statute reaches as far as the Due Process Clause permits. It then explained that "[t]he Eighth Circuit has established a five-factor test to determine the sufficiency of a defendant's contacts" under the Due Process Clause: "(1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) [the] convenience of the parties." App., *infra*, 13a-14a.

Next, the court "carefully considered" Dassault's contacts with Arkansas and concluded that Anderson had not made out "a *prima facie* showing of personal jurisdiction." App., *infra*,

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[1] In *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-16 n.9 (1984), this Court recognized that personal jurisdiction comes in two distinct forms: (1) *specific* jurisdiction (where the cause of action specifically "aris[es] out of or relate[s] to" the defendant's contacts with the forum), and (2) *general* jurisdiction (where the defendant's activities *within* the forum are so substantial, "continuous and systematic" that the law deems the defendant to be "present" and thus amenable to *any* kind of suit, even one wholly unrelated to the defendant's forum contacts).

15a. "It is undisputed," the court explained, "that Dassault Aviation *itself* was neither present nor doing business in Arkansas." *Ibid.* Moreover, "Anderson does not dispute" that Dassault "is a French Corporation" that, in the State of Arkansas, "is not qualified or licensed to do business," "maintains no offices * * * and owns no real property," "maintain[s] [no] agent for service of process," "does not have a telephone listing * * * [or] any warehouse or manufacturing facilities," "does not have a bank account * * * [or] insure any person," "does not enter into any contracts to furnish goods or products," and "has not consented to be haled into court." *Ibid.*; see also C.A. App. 11-12.

Like the Michigan district court, the Arkansas district court rejected Anderson's argument that jurisdiction could be asserted over Dassault based on the contacts that *Falcon Jet* had with the State. App., *infra*, 15a-20a & n.4. Attribution or "imput[ation]" of the subsidiary's contacts to the parent company, the court reasoned, "is contingent on the ability of Anderson to pierce the corporate veil" under "[s]tate law." *Id.* at 16a-17a & n.4. But Anderson had not made the required showing by "clear proof" that Dassault had "so controlled and dominated the affairs" of Falcon Jet that veil-piercing was permissible. *Id.* at 18a (internal quotations omitted). "[N]one of the evidence" submitted by Anderson – including jointly published "operator directories, press releases, [and] websites," or the "distributorship agreements" entered into by Dassault and Falcon Jet, or various statements or data in Dassault's "annual reports[] and financial statements" – demonstrated that Falcon Jet "was controlled and manipulated by Dassault" and "was thus the mere instrumentality or alter ego of Dassault." *Ibid.* See also note 2, *infra*.

Equally meritless, the district court stated, was Anderson's reliance on the fact that Dassault and Falcon Jet "share two officers." App., *infra*, 18a. The "[m]ere[]" fact that "the two corporations are managed by the same officers," the court held, "does not thereby make the acts of * * * Falcon Jet * * * those of Dassault." *Id.* at 19a; see also *id.* at 18a. "Rather, the evidence of record reveals nothing more than a *typical corporate relationship* between a parent and its wholly owned subsidiary."

Ibid. (emphasis added); see also *id.* at 18a (sharing of two officers was "of no import").

Finally, the fact that Amway's airplane had been "completed" in Little Rock (a term of art in the aircraft industry) had no bearing on *Dassault*'s contacts because, as Anderson conceded, the customizing work was done by *Falcon Jet*. App., *infra*, 19a. Moreover, the term "completed" was "misleading" because it refers to the customizing process and there was no dispute that Dassault had parted with title to its product in France. *Ibid.* Thus, Anderson had "failed to link" Dassault to Arkansas "except as a parent corporation." *Id.* at 21a.

C. The Court of Appeals' Decision

A panel of the Eighth Circuit reversed. App., *infra*, 1a-9a. Initially, the court of appeals rejected the district court's "bright-line rule" according to which "the activities of the parent's subsidiary" must be disregarded "unless the subsidiary's veil can be pierced under state law." *Id.* at 4a. "Determining the propriety of jurisdiction," the Eighth Circuit said, is "not readily amenable to rigid rules that can be applied across the entire spectrum of cases." *Id.* at 4a-5a.

Next, the panel evaluated Dassault's due process challenge by examining, and balancing, the following considerations: "the quantity of contacts that Dassault Aviation has with Arkansas"; "the quality and nature of those contacts"; "the interest of Arkansas in adjudicating the dispute"; and the convenience of the parties. App., *infra*, 3a. The panel also explained that, "[i]n assessing the nature of" Dassault's contacts (*ibid.*), it would weigh "'the interstate judicial system's interest in obtaining the most efficient resolution of controversies'" and "'the shared interest of the several states in furthering fundamental substantive social policies.'" *Ibid.* (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980)). The panel did not, however, mention the distinction between "specific" and "general" jurisdiction (much less apply the different legal tests applicable to each). See note 1, *supra*.

Turning to Dassault's supposed contacts with Arkansas, the panel first acknowledged that they "result, in large part, from" Dassault's "business relationship with * * * Falcon Jet, which operates a large production site in Little Rock * * * *." App., *infra*, 3a. The panel did not disturb the district court's finding that Falcon Jet was not Dassault's alter ego, nor did it conclude that veil piercing was permissible on this record. See *id.* at 5a (stating that Dassault's ownership of Falcon Jet's shares was not "an abuse of the corporate organizational form"). The panel nevertheless emphasized what it viewed as the "close, synergistic" or "symbiotic" relationship between the French parent and its U.S. subsidiary. *Id.* at 5a, 9a. The panel also considered it important that Dassault "benefits greatly from * * * Falcon Jet's exclusive distribution of its business jets throughout the western hemisphere" and "has a clear awareness of and interest in its subsidiary's substantial operations in Arkansas." *Id.* at 5a.[2]

The panel also noted that "[t]he majority of jets sold worldwide by Dassault Aviation fly in and out of Arkansas to be completed to the specifications of consumers" at Falcon Jet's Arkansas facility. App., *infra*, 5a. The panel said that "[t]his is not a situation in which Dassault Aviation simply placed the jet at issue 'into the stream of commerce' which fortuitously swept it into Arkansas." *Id.* at 7a. The panel also cited *Clune* v. *Alimak AB*, 233 F.3d 538 (8th Cir. 2000), cert. denied, 533 U.S.

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[2] The panel identified several other indicia of a "closely intertwined business relationship" that it believed justified attributing Falcon Jet's activities in Arkansas to Dassault, including: (1) a statement in Dassault's annual report that the company was "present" in the United States "through its [Falcon Jet] subsidiary"; (2) the existence of "[a] website jointly administered by" Dassault and Falcon Jet that included a description of their prior collaboration; (3) the "overlap" in the "officers and directors of the two companies" (which the district court had brushed aside as insignificant); (4) the fact that Dassault "paid over $126 million" to Falcon Jet in the seven years preceding the filing of this lawsuit for completions on jets that Dassault itself later sold to third parties; (5) the use by both companies of "the word 'Dassault' in their name" and "a common logo"; and (6) the companies' collaboration in publishing several directories of owners of Dassault business jets or of customer service information. App., *infra*, 5a-8a.

929 (2001), for the proposition that "'a foreign manufacturer that successfully employs one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market.'" App., *infra*, 8a (quoting 233 F.3d at 444)). Because "*Falcon Jet* not only marketed and sold products in Arkansas, but [also] * * * operated" there the "largest production facility" of the "Dassault Aviation Group,"[3] the panel concluded that *Dassault* had "purposefully directed its products to the United States, and specifically to Arkansas." *Ibid.* (emphasis added; internal quotations omitted).

Finally, the panel observed that other "considerations" also "support[ed] the exercise of personal jurisdiction in Arkansas." App., *infra*, 9a. It asserted that Arkansas's interest in the subject matter of the dispute was "substantial," even though Anderson is a Michigan citizen and the injury occurred in Michigan, because "the safety of Falcon jets affects the state's consumers and workers who encounter Dassault Aviation's products"; that Anderson's interest in the Arkansas forum was strong, because she "likely has no other forum available to her" in the United States in which to sue Dassault; and that the prejudice to Dassault from being compelled to defend in Arkansas was not significant, because "presum[ably]" Dassault "has ready access to air transportation for conveniently making the trip." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the Court with a valuable opportunity to resolve conflicts and dispel pervasive confusion in the lower courts over the limits imposed by the Due Process Clause on the power of a State to exercise *in personam* jurisdiction over a nonresident defendant. This important question, which arises at the threshold of much civil litigation, has "become one of the most litigated issues in state and federal courts." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1995) (taking note of more than 2300

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[3] The court of appeals used this term to refer collectively to Dassault and several of its subsidiaries, including Falcon Jet. See App., *infra*, 2a.

cases involving "minimum contacts" test in 1990-95 alone). For almost 20 years, since *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), this Court has only rarely ventured its views about the content of the "minimum contacts" test first announced in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). This Court's fractured decisions in *Burnham* v. *Superior Court*, 495 U.S. 604 (1990), and *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102 (1987), were unable to clarify the vast run of personal jurisdiction cases, including the large category of cases involving non-U.S. corporations. And, although this Court granted review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), to resolve a circuit conflict over an important subsidiary question in this area of law, that case was resolved on another ground. *Id.* at 588-89.

It was not always so. Between 1945, when this Court first declared that due process precludes a State from exercising *in personam* jurisdiction unless there are "minimum contacts" between the defendant and the State "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*International Shoe Co.*, 326 U.S. at 316), and *Asahi* in 1987, this Court decided eighteen cases involving the *International Shoe* test. See McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 771 (2003). Under the prior, territorial-based regime of *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), which lasted for 68 years, this Court addressed the question of personal jurisdiction "at least fifty-three times." McFarland, 68 MO. L. REV. at 769. In sharp contrast to that historically high level of attention, this Court "has not returned to the minimum contacts test for sixteen years." *Ibid.*

The Court's prolonged absence from this important field of constitutional law has effectively allowed the lower courts to place "various polishes on the *International Shoe* test in an attempt to give themselves some guidance." McFarland, 68 MO. L. REV. at 781; *id.* at 782 (each circuit "deals with the minimum contacts/fair play test in its own fashion"); ABA LITIGATION SECTION, BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 2.6, at 83 (Robert L. Haig ed. 1998)

(acknowledging "major inconsistencies in analysis from circuit to circuit"); *Metropolitan Life Ins. Co.* v. *Robertson-Ceco Corp.*, 84 F.3d 560, 577 (2d Cir.) (Walker, J., dissenting) ("The sprouting like weeds of multi-pronged tests * * * in the circuits * * * has left this legal garden in disarray.") (citing numerous cases), cert. denied, 519 U.S. 1006 (1996). This case provides a telling example. See pages 3-5, *supra* (describing the different legal tests of the Sixth and Eighth Circuits that were applied by the federal district courts in Michigan and Arkansas).

Moreover, since *Burger King* was decided in 1985, much has changed. The increasing globalization of markets and commerce, the use of the Internet in commerce, and the proliferation of large multinational business enterprises (see T. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 9, 80-81, 95 (2000)) – all are examples of important societal developments whose significance courts have struggled to determine in personal jurisdiction cases. Some lower courts, such as the Eighth Circuit, appear to have concluded that these developments have largely erased the limits on the adjudicative jurisdiction of individual States. Cf. *Asahi*, 480 U.S. at 117 (Brennan, J., joined by White, Marshall & Blackmun, JJ., concurring in part and concurring in the judgment) (suggesting that personal jurisdiction may be asserted over any nonresident manufacturer that is "aware that [its] final product is being marketed in the forum State" because the manufacturer "benefits economically from the retail sale").

Other courts, in contrast, have insisted on a stricter approach, adhering carefully to established distinctions and doctrinal categories in the law of personal jurisdiction and emphasizing the inherent limits on the power of any individual State within our federal system. These courts have emphasized the need, in conducting the due process analysis, to honor those principles of law (such as the "alter ego" doctrine in corporation law) that create a "degree of predictability to the legal system" that is necessary to "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297 (internal quotations

omitted); see also *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (stating that "bedrock" principles of corporate law – including strict standards governing piercing of the corporate veil – are "deeply ingrained in our economic and legal system").

This case provides an ideal vehicle for addressing the substantial confusion in the lower courts. The first question presented – concerning the proper legal standard governing when the forum contacts of one corporation may be attributed or imputed to an affiliated corporation (here, a parent company) – raises an important and recurring issue that has sharply divided the lower courts. The second question presented offers the Court the opportunity to address misunderstandings about the meaning of the *International Shoe* test and resolve additional conflicts in the lower courts. The Eighth Circuit is especially in need of correction. For years, it has meandered among variations of a multi-factor balancing test that merely pays lip service to this Court's earlier decisions while ignoring this Court's more recent doctrinal developments. As we explain below, both questions presented easily satisfy this Court's traditional criteria for certworthiness.

Finally, that this case involves a *non-U.S. corporation* makes it an especially good vehicle for adapting the law of personal jurisdiction to "today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd.* v. *Empagran*, 124 S. Ct. 2359, 2366 (2004). In *Asahi*, this Court instructed that, "[i]n every case" involving an alien defendant, the interests of other countries "as well as the Federal interest in Government's foreign relations policies, will be best served by *a careful inquiry* into the reasonableness of the assertion of jurisdiction." 480 U.S. at 115 (emphasis added); see also *ibid.* ("*Great care and reserve* should be exercised when extending our notions of personal jurisdiction into the international field.") (emphasis added; internal quotations omitted); *id.* at 114-15 (burdens placed on alien defendant must be given "substantial weight"). Nevertheless, the lower courts have differed greatly in how much weight they give in cases such as this to the "procedural and substantive policies of other nations," and the "unique burdens" imposed on

non-U.S. corporations. *Asahi*, 480 U.S. at 115. The Eighth Circuit acknowledged that "the distance between France and Arkansas is substantial" but dismissed that important consideration with the surprisingly casual observation that "we presume that Dassault Aviation has ready access to air transportation for conveniently making the trip." App., *infra*, 9a.

I. The Decision Below Conflicts With Decisions Of This Court And The Lower Courts And Raises Important And Recurring Issues

In rejecting petitioner's due process challenge to the exercise of personal jurisdiction, the Eighth Circuit relied almost exclusively on the activities of Falcon Jet, petitioner's wholly owned subsidiary, in Arkansas. In so doing, the court of appeals rejected the district court's "bright-line rule" under which Falcon Jet's contacts could not be attributed to Dassault "unless the subsidiary's veil can be pierced under state law." App., *infra*, 4a. Consistent with other Eighth Circuit decisions, the panel then proceeded to apply a multi-factor balancing test in determining whether *in personam* jurisdiction could be asserted over Dassault consistent with due process. *Ibid.* That analysis and holding conflict, in at least two critical respects, with decisions of this Court, other circuits, and state supreme courts.

A. The Eighth Circuit's Approach To Attributing A Subsidiary's Forum Contacts To A Parent Company

As the district court noted, at all relevant times Falcon Jet had a relationship with Dassault that was "nothing more than a typical corporate relationship between a parent and its wholly owned subsidiary." App., *infra*, 19a; accord *id.* at 26a-27a (district court in Michigan). Nevertheless, the Eighth Circuit relied on the parent-subsidiary relationship to hold that Dassault had sufficient contacts with Arkansas to be amenable to jurisdiction there. *Id.* at 5a ("Dassault Aviation and Dassault Falcon Jet have a close, synergistic relationship that is not an abuse of the corporate organizational form, but is clearly relevant to the jurisdictional question."). That holding contributes to the confusion on what "has long been an unsettled issue." Voxman,

Jurisdiction over a Parent Corporation in its Subsidiary's State of Incorporation, 141 U. PA. L. REV. 327, 327 (1992).

1. In *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), this Court held that the maintenance of corporate formalities – so long as "not pure fiction" – precluded a finding of jurisdiction over a foreign parent corporation based on its subsidiary's contacts. The plaintiff in *Cannon* (a North Carolina company) initially sued a Maine corporation in North Carolina state court for breach of contract. Plaintiff served a wholly owned subsidiary of the Maine corporation, which had an office in North Carolina and was "the instrumentality employed to market [the parent's] products within the state" (the subsidiary did not market the product "as [the parent's] agent" but rather, like Falcon Jet, purchased it from the parent and then sold it to dealers). *Id.* at 335. Although the parent was a large national enterprise that "dominate[d]" the subsidiary "*immediately and completely*," this Court refused to disregard the "corporate separation" so "carefully maintained" through the keeping of separate books and the observance of all corporate formalities. *Ibid.* (emphasis added). "The corporate separation," this Court reasoned, "though perhaps merely formal, was real. *It was not pure fiction*." *Id.* at 337 (emphasis added).

Although decided before *International Shoe* and *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and based on federal common law rather than the Due Process Clause, *Cannon* has been followed by some courts faced with the issue of how to analyze whether a parent company, based on the activities of a subsidiary, can be haled into a distant forum where it does not do business. See, *e.g.*, *Consolidated Development Corp.* v. *Sherritt, Inc.*, 216 F.3d 1286, 1293-94 (11th Cir. 2000) (applying *Cannon* rule); *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 699 F.2d 1254, 1258-59 (D.C. Cir. 1983) ("the relationship of parent and subsidiary alone would not suffice" for "service on the parent to reach a foreign subsidiary") (citing *Cannon*); *Gray* v. *Riso Kagaku Corp.*, 1996 WL 181488, at *3 (4th Cir. Apr. 17, 1996) ("mere fact that Riso Kagaku's subsidiaries do business in South Carolina does not confer personal jurisdiction over

Riso Kagaku"); *Gallagher* v. *Mazda Motor of Am.*, 781 F. Supp. 1079, 1083-84 & n.9 (E.D. Pa. 1992) (citing many cases that have followed *Cannon* and refused to impute contacts when "corporations observe and respect the corporate form").

2. Other courts, in contrast, have ruled that the *Cannon* standard was superseded by this Court's decision in *International Shoe*, see *Velandra* v. *Regie Nationale Des Usines Renault*, 336 F.2d 292, 296-97 (6th Cir. 1964), or by certain dicta in *World-Wide Volkswagen* (discussed at pages 28-30, *infra*). See *In re Telectronics Pacing Systems, Inc.*, 953 F. Supp. 909, 917-18 (S.D. Ohio 1997) (citing cases); *Coca-Cola Co.* v. *Procter & Gamble Co.*, 595 F. Supp. 304, 306-08 (N.D. Ga. 1983) (rejecting *Cannon*, but analyzing whether formal corporate separation between the defendant and its subsidiary had been maintained before finding jurisdiction over the parent in the forum).

Some of these courts have applied traditional "alter ego" principles in examining whether to pierce the corporate veil between parent and subsidiary in determining issues of personal jurisdiction. See, *e.g.*, *Alpine View Co.* v. *Atlas Copco AB*, 205 F.3d 208, 218-19 (5th Cir. 2000); *Volkswagenwerk Aktiengesellschaft* v. *Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984) (analyzing factors relevant to the possible "disregard for the separate corporate existence of the subsidiary"); *Great Lakes Overseas, Inc.* v. *Wah Kwong Shipping Group, Ltd.*, 990 F.2d 990, 996-97 (7th Cir. 1993) (looking to Illinois alter-ego principles and holding that jurisdiction could not be asserted over a Hong Kong corporation based on the contacts of its subsidiary in Illinois). Some state supreme courts have also required a showing of alter ego status. See, *e.g.*, *Panamerican Mineral Servs., Inc.* v. *KLS Enviro Resources, Inc.*, 916 P.2d 986, 990-91 (Wyo. 1996) (listing factors that justify piercing the corporate veil) (citing *Westinghouse Elec. Corp.* v. *Superior Court*, 551 P.2d 847 (Cal. 1976)). See also Comment, *Jurisdiction Over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 925-37 (1988) (discussing additional "alter ego" cases and acknowledging divergence in approaches of lower courts).

3. The Eighth Circuit's decision in this case conflicts with *both* of these lines of cases. The panel ruled that "piercing Dassault Falcon Jet's corporate veil" was not "required to establish the minimum contacts necessary for the exercise of personal jurisdiction in Arkansas." App., *infra*, 5a. Instead, the court of appeals held that it was enough that Dassault has a "close, synergistic" or "symbiotic" relationship with its subsidiary (*id.* at 5a, 9a) – even though virtually all the evidence of such a relationship in this case (see note 2, *supra*) consists of ordinary incidents of a parent-subsidiary relationship.

The Eighth Circuit's holding squarely conflicts with *Cannon* and its progeny because there is no dispute that the formal separation between Dassault and Falcon Jet was scrupulously maintained. The panel's holding also conflicts with cases that, though declining to follow *Cannon*, apply the "alter ego" doctrine to determine whether attribution is appropriate. Under the "alter ego" standards employed in Arkansas, the corporate veil could not possibly have been pierced in this case – and the Eighth Circuit did not suggest otherwise. See App., *infra*, 15a-18a & n.4 (discussing Arkansas case law); accord App., *infra*, 26a-27a (district court in Michigan similarly held that requirements of Michigan "alter ego" doctrine could not be met). The Eighth Circuit's novel "close, symbiotic relationship" test for attributing the forum contacts of corporate affiliates – if indeed anything so seemingly indeterminate can accurately be described as a "test" – is already having an impact within that jurisdiction. See *Enterprise Rent-A-Car Co.* v. *U-Haul Int'l, Inc.*, 2004 WL 1724654, at *10 (E.D. Mo. July 22, 2004) (applying the "symbiotic relationship" test and finding it satisfied based, among other things, on parent company's provision of "accounting, technical, and advisory services" to subsidiary, fact that the two companies' businesses were "interrelated and complementary," and the linkage of companies' websites reflecting a "unified marketing strategy").

4. The Eighth Circuit is not the only court to disregard or depart from veil-piercing standards in attributing the forum contacts of one affiliated corporation to another. See, *e.g.*,

Wells Fargo & Co. v. *Wells Fargo Express Co.*, 556 F.2d 406, 425 (9th Cir. 1977); *Bridgestone Corp.* v. *Lopez*, 131 S.W.3d 670, 681-86 (Tex. Ct. App. 2004); *Daimler-Benz Aktiengesellschaft* v. *Olson*, 21 S.W.3d 707, 720-25 (Tex. Ct. App.), rev. denied, 53 S.W.3d 308 (Tex. 2000), cert. denied, 535 U.S. 1077 (2002); see also *Davis* v. *Metro Prods., Inc.*, 885 F.2d 515, 521 (9th Cir. 1989) (holding that "the question whether there exists a jurisdictional corporate shield" is not "an issue of constitutional dimensions"); *Energy Reserves Group, Inc.* v. *Superior Oil Co.*, 460 F. Supp. 483, 504-05 (D. Kan. 1978); *Brunswick Corp.* v. *Suzuki Motor Co., Ltd.*, 575 F. Supp. 1412, 1420 (E.D. Wis. 1983). Some of these departures from traditional principles of corporation law have been quite substantial. In *Lopez*, for example, a Texas court recently used a broad "single business enterprise" theory to justify jurisdiction over a Japanese corporation, with no forum contacts, for a claim arising from an accident in Mexico based on a product manufactured by the corporation's indirect subsidiary in Mexico. See 131 S.W.2d at 681-86. Thus, the implicit (but necessary) rejection of the *Cannon* approach by the court below gives this Court an opportunity to correct – or ratify – the approach of numerous lower courts to a clean legal issue.

5. Commentators have recognized the pervasive confusion and conflicts in the lower courts on the attribution issue:

> The confusion in the courts is understandable. A single court has sometimes reached different conclusions on the issue in cases falling within months of each other. The United States Supreme Court has not recently addressed the validity of *Cannon* or the effect of *International Shoe* on the *Cannon* doctrine. In light of the confusion among the courts concerning the authority of states to exercise jurisdiction over corporations on the basis of the activities of affiliated corporations, the United States Supreme Court should resolve the issue.

Comment, *Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do you Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 618 (1992).

B. The Eighth Circuit's Multi-Factor Balancing Test

1. In *International Shoe*, this Court held that the Due Process Clause precludes a State from exercising *in personam* jurisdiction over a nonresident defendant unless the defendant has "minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. 310, 316. The panel's decision in this case (consistent with other Eighth Circuit decisions) applied a multi-factor balancing test in deciding whether the *International Shoe* standard was satisfied. That approach, however, is inconsistent with this Court's decisions in at least three respects.

First, it ignores this Court's teaching that the *International Shoe* test *consists of two separate steps*: (1) "minimum contacts" ; and (2) "fair play and substantial justice." "Once it has been decided that a defendant purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King*, 471 U.S. at 476 (internal quotations omitted). The existence of minimum contacts, in other words, is the "constitutional touchstone." *Id.* at 474; accord *World-Wide Volkswagen*, 444 U.S. at 291 ("a state court may exercise personal jurisdiction over a nonresident defendant *only* so long as there exist 'minimum contacts' between the defendant and the forum State") (emphasis added). The Court repeated this two-step analysis in *Asahi*. 480 U.S. 102, 108-09 (1987) (plurality); *id.* at 121-22 (opinion of Stevens, J.).

The two-stage analysis is important because it ensures that the constitutional minimum nexus between a nonresident defendant and the forum is established *before* courts undertake an examination of the more nebulous "fairness" considerations. Unless the analysis proceeds in two distinct steps, the "fair play and substantial justice" factors (which have little if anything to

do with the extent of the defendant's contacts with the forum) might be used to support the assertion of jurisdiction even if the defendant's forum contacts are nonexistent. Ignoring the teachings of *Burger King* and *Asahi*, the panel below simply tossed Dassault's attenuated contacts with Arkansas into a goulash with such "fair play and substantial justice" factors as the plaintiff's convenience. See App., *infra*, 3a (explaining that fair-play factors would be considered "[i]n assessing the nature of the contacts between Dassault Aviation and Arkansas").

Second, in evaluating whether Dassault could be compelled to appear and defend this lawsuit in Arkansas, the panel failed to distinguish between (or separately analyze) two types of personal jurisdiction: "specific" and "general" jurisdiction. See note 1, *supra*; *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-16 n.9 (1984). This distinction is important because it provides structure to an otherwise amorphous due process inquiry. It is also important because the underlying *legal tests* concerning the requisite "minimum contacts" with a forum are *different* for general and specific jurisdiction. Before a State may assert general jurisdiction, the defendant must have engaged in activities within the forum that are both "continuous" and "systematic." *Id.* at 416 n.9. For corporate defendants, that test ordinarily is satisfied only where the defendant is incorporated or has significant operations, facilities, employees, and property. In contrast, the test for "specific" jurisdiction does not require contacts that are either "continuous" or "systematic," but rather requires a close nexus between the forum contacts and plaintiff's legal claims. By ignoring the crucial distinction between specific and general jurisdiction, the panel's decision strays from this Court's teachings.

Third, the Eighth Circuit's balancing approach in general, and the panel's decision in particular, ignore relevant comity considerations. As noted above, this Court in *Asahi* made clear that, in cases involving non-U.S. defendants, the inquiry "must" take account of the "procedural and substantive policies of other nations" and of the "unique burdens" imposed on a non-U.S.

corporation forced to defend litigation in a distant State. 480 U.S. at 113, 115. But the panel's analysis includes no serious consideration of the special concerns raised by exercising jurisdiction in Arkansas over an unwilling French manufacturer.

In *F. Hoffmann-La Roche Ltd.* v. *Empagran*, 124 S. Ct. 2359 (2004), this Court recently took account of comity concerns in recognizing that the *prescriptive* jurisdiction of the United States ordinarily will not be understood to reach foreign conduct by non-U.S. companies that causes independent foreign harm (underlying a plaintiff's legal claims). *Id.* at 2366-67. Moreover, "America's antitrust laws" have long been understood not to apply to foreign conduct that does not cause a "*domestic* antitrust injury." *Id.* at 2367 (emphasis in original). At bottom, the present case raises a corollary question: whether a single State's *adjudicative* jurisdiction may be extended, in a product liability action, to a foreign manufacturer that designed, made, and sold its product abroad, if the product caused no injury giving rise to plaintiff's claim in the State asserting jurisdiction. In "today's highly interdependent commercial world" (*id.* at 2366), the answer to that question will determine not just the scope of personal jurisdiction in *U.S. courts*. Interdependence, after all, is a two-way street. The approach taken by U.S. courts in such cases is likely to be reciprocated abroad, with the end result that U.S. manufacturers will be subjected to similarly broad assertions of adjudicatory jurisdiction (and similar disregard of corporate formalities) in the courts of foreign countries.

2. The panel's application of the Eighth Circuit's unstructured, multi-factor balancing test is at odds with decisions of many lower courts. Other circuits read this Court's decisions as having articulated fairness or reasonableness as a separate and independent stage in the *International Shoe* analysis. For example, in *Donatelli* v. *Nat'l Hockey League*, 893 F.2d 459 (1st Cir. 1990), the court stated: "*Only if – and after* – minimum contacts have been shown to exist may such contacts 'be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play

and substantial justice."'" *Id.* at 464 (emphasis added) (quoting *Burger King*, 471 U.S. at 476). Thus, the First Circuit explained, "the judicial inquiry * * * has two stages." *Id.* at 465. Other circuits and state supreme courts agree. See, *e.g.*, *Metropolitan Life Ins. Corp.* v. *Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir.), cert. denied, 519 U.S. 1006 (1996); *OMI Holdings Inc.* v. *Royal Ins. Co.*, 149 F.3d 1086, 1091 (10th Cir. 1998); *Sutherland* v. *Brennan*, 901 P.2d 240, 245 (Or. 1995); *Cerberus Partners, L.P.* v. *Gadsby & Hannah, LLP*, 836 A.2d 1113, 1121 (R.I. 2003); see also Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on* Asahi Metal Indus. Co. *v.* Superior Ct. of Cal., 1987 DUKE L.J. 669, 680 (discussing the role of *Asahi* in creating a separate "reasonableness" analysis).

The Eighth Circuit unfortunately is not alone in refusing to treat "minimum contacts" and "fair play and substantial justice" as separate steps in the constitutional analysis. At least three state supreme courts in the Eighth Circuit currently apply the following, five-part test that originated in *Aftanase* v. *Economy Baler Co.*, 343 F.2d 187, 195-97 (8th Cir. 1965) (Blackmun, J.):

> (1) the nature and quality of a nonresident defendant's contacts with the forum state; (2) the quantity of the nonresident defendant's contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties.

Hansen v. *Scott*, 645 N.W. 2d 223, 234 (N.D. 2002), cert. denied, 537 U.S. 1108 (2003). Accord *Covia* v. *Robinson*, 507 N.W.2d 411, 415 (Iowa 1993); *Vikse* v. *Flaby*, 316 N.W.2d 276, 282 (Minn. 1982); see also *Lee* v. *Goshen Rubber Co.*, 635 N.E.2d 214, 216 (Ind. App. 1994).[4]

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[4] Although the state courts that apply this five-factor balancing test take the view that "the first three factors are of primary importance," and the "fourth and fifth factors are of only secondary importance and are not determinative," *Ensign* v. *Bank of Baker*, 676 N.W. 2d 786, 791 (N.D. 2004), the fact remains that it is a balancing test rather than (as this Court's cases require) a two-

The Eighth Circuit's failure to differentiate between specific and general jurisdiction – and to apply the different standards applicable to each in assessing the existence of minimum contacts – also conflicts with the decisions of other circuits. Following this Court's *Helicopteros* decision, many lower courts have taken pains to conduct separate inquiries into whether specific or general jurisdiction may be asserted. See, *e.g.*, *Purdue Research Found.* v. *Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 780-89 (7th Cir. 2003); *ESAB Group, Inc.* v. *Centricut, Inc.*, 126 F.3d 617, 623-26 (4th Cir. 1997), cert. denied, 523 U.S. 1048 (1998); *Cerberus Partners, L.P.* v. *Gadsby & Hannah, LLP*, 836 A.2d 1113, 1118-23 (R.I. 2003). As the panel's decision in this case shows, however, the Eighth Circuit has not adhered to this critical distinction.

Finally, other lower courts have – consistent with *Asahi* – taken foreign-policy considerations into account in evaluating whether it would offend "fair play and substantial justice" to assert jurisdiction over a resistant non-U.S. corporation. See, *e.g.*, *Amoco Egypt Oil Co.* v. *Leonis Navigation Co.*, 1 F.3d 848, 851 (9th Cir. 1993); *Guardian Royal Exch. Assurance, Ltd.* v. *English China Clays, P.L.C.*, 815 S.W.2d 223, 228-29 (Tex. 1991). But the Eighth Circuit gave no weight to such concerns.

3. As shown by the decision of the district court in Michigan dismissing Anderson's claim against Dassault, other circuits interpret *International Shoe* as requiring consideration of a three-factor test, including whether the defendant has "purposefully availed" itself of the "privilege of acting in the forum state or causing a consequence in the forum state." App., *infra*, 27a (quoting *Kerry Steel, Inc.* v. *Paragon Indus., Inc.*, 106 F.3d 147, 150 (6th Cir. 1997)). By its plain terms, the Sixth Circuit's test differs from the Eighth Circuit's. See pages 3-7, *supra*.

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stage analysis. Moreover, as this Court made clear in *Burger King*, the fourth and fifth factors (as well as other "fair play and substantial justice" considerations) in fact *can be determinative*: they may provide a reason why due process bars the exercise of *in personam* jurisdiction even over a defendant that has "minimum contacts" with the forum. See 471 U.S. at 477-78.

Notably, the Michigan district court held that Anderson could not satisfy this competing due process test in Michigan.

4. As explained above (at 9-10), this confusion in the lower courts has not been lost on commentators. See also McFarland, *supra*, 68 MO. L. REV. at 782-89 (describing the Eighth Circuit's five-part test and the "widely varying" tests applied by other circuits and state courts). Moreover, commentators have singled out the Eighth Circuit's approach for criticism. See Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 840-42 (2004) (Eighth Circuit's "whole-hog" approach "collapses the general jurisdiction, specific jurisdiction, and fair play and substantial justice analysis into one sweeping inquiry," "often fails to adequately factor the quantitative and qualitative nature of contacts necessary for an assertion of general jurisdiction," "intermingle[s] specific and general jurisdiction principles," and creates serious uncertainty for defendants).[5] The present case, coming from the Eighth Circuit and presenting that court's approach cleanly for review, is as good a vehicle as this Court is ever likely to get for resolving these recurring issues.[6]

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[5] This Court's review is especially needed because of the continuing influence in the Eighth Circuit (and in several States) of then-Judge Blackmun's opinion in *Aftanase*, *supra*. The district court applied *Aftanase*'s five-factor balancing test (App., *infra*, 14a), and the Eighth Circuit has continued to cite the test favorably and apply it. See, *e.g.*, *Wessels, Arnold & Henderson* v. *National Medical Waste, Inc.*, 65 F.3d 1427, 1432 (8th Cir. 1995); *Land-O-Nod Co.* v. *Bassett Furn. Indus., Inc.*, 708 F.2d 1338, 1340 (8th Cir. 1983). In its failure to distinguish adequately between "specific" and "general" jurisdiction, and in its collapse of the two-stage due process inquiry into one balancing test, the panel's approach owes an obvious intellectual debt to the *Aftanase* test. Because the *Aftanase* test was distilled from five decisions of this Court issued between 1945 and 1958 (see 343 F.2d at 195-97), it is not surprising that it fails to reflect this Court's more recent doctrinal refinements. See Rhodes, *supra*, 34 SETON HALL L. REV. at 840-41 (Eighth Circuit's approach "predate[s] significant modern refinements").

[6] This case, coming from federal court, does not present any of the 28 U.S.C. § 1257 finality issues that respondents sometimes raise in cases coming from state court. It thus presents a better or at least cleaner vehicle than did

C. The Issues Raised Are Important And Recurring

The Eighth Circuit's decision presents significant questions concerning the limits imposed by the Due Process Clause on the exercise of *in personam* jurisdiction. Thirty-two out of fifty States authorize the assertion of personal jurisdiction to the maximum extent permitted by due process. See McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended The Limits Of Due Process*, 84 B.U. L. REV. 491, 525-30 (2004). The question of what limits are imposed by the Federal Constitution thus arises with great regularity not only in the courts of those States but also in the federal courts that sit in those States (in diversity as well as federal-question cases). See *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987).

Moreover, each of the two issues discussed above is both significant and recurring. The proper approach to attributing or imputing the forum contacts of a subsidiary corporation to its parent (or vice versa), and for making attribution decisions concerning other types of corporate affiliates, is frequently litigated in the federal and state courts, as several empirical studies confirm. See, *e.g.*, Swain & Aguilar, *Piercing the Veil To Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the* Cannon *Doctrine*, 84 B.U. L. Rev. 445, 450, 455 (2004) (analysis of more than 500 reported cases) (noting that in cases involving "multi-corporate groups" the issue of veil-piercing "arises with great frequency in the area of personal jurisdiction"); Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991). The same issue arises in a variety of other procedural settings (such as diversity jurisdiction and venue). See P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS §§ 6.04, 9.03-9.05 (1983).

DaimlerChrysler Aktiengesellschaft v. *Olson*, 535 U.S. 1077 (2002), *McInnis* v. *Daniel*, 535 U.S. 1077 (2002), or *Southern Co.* v. *Alderson*, 535 U.S. 1090 (2002).

Equally significant and recurring is the second question presented, which involves the proper test for determining whether a nonresident defendant has "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. Indeed, that issue arises in *every* personal jurisdiction case that involves due process limits. There is no reason why substantially different tests should be applied in different circuits and States. The commands of the Due Process Clause should not vary from jurisdiction to jurisdiction.

These two issues each warrant this Court's review. Together, they make this case an excellent vehicle for clarifying and rationalizing the law of personal jurisdiction.

II. The Decision Below Is Incorrect

In addition to being squarely at odds with the decisions of this Court, other circuits, and state supreme courts, the Eighth Circuit's holding and analysis are severely flawed. The lower court improperly attributed the Arkansas contacts of Falcon Jet to its shareholder and parent company despite the absence of any valid basis for piercing the corporate veil; incorrectly relied on such ordinary features of large corporate families as the existence of overlapping officers or directors and the use of internationalist rhetoric in annual reports; applied a faulty test for assessing the due process limits on *in personam* jurisdiction; and ultimately reached the wrong conclusion as to whether the exercise of jurisdiction in this case is consistent with due process. The decision, in short, is wrong at every turn.

1. The Eighth Circuit was wrong to refuse, in attributing Falcon Jet's Arkansas contacts to petitioner, to follow *Cannon* or at least to honor traditional veil-piercing and "alter ego" doctrines. As explained above (at 13, 15-16), the Eighth Circuit's analysis is inconsistent with *Cannon*. It also ignores this Court's basic teachings about how courts must go about determining the requirements of due process. Courts must look to the "traditional" practices and principles of our people in deter-

mining what due process requires. *International Shoe*, 326 U.S. at 316; see also *Burnham*, 495 U.S. at 609-10 (plurality). This the Eighth Circuit failed to do.

This Court recently reaffirmed that "bedrock" principles of corporate law – including stringent standards governing piercing of the corporate veil – are "'deeply ingrained in our economic and legal systems.'" *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998) (quoting Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929)); "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Foods Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). Certainly that principle was well established by the time this Court decided *International Shoe* in 1945. See, *e.g.*, *Berkey* v. *Third Ave. Ry. Co.*, 155 N.E. 58, 58 (N.Y. 1926) (Cardozo, J.) ("Stock ownership alone would be insufficient to charge the dominant company with liability for the torts of the subsidiary.").[7]

The Eighth Circuit's attribution holding also runs counter to several other decisions of this Court. In *Shaffer* v. *Heitner*, 433 U.S. 186, 213 (1977), the Court held that the presence of a corporation in Delaware did not justify jurisdiction over the corporation's officers and directors. In *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980), the Court rejected the argument that jurisdiction over an individual defendant in an automobile accident case could be based solely on the forum contacts of his insurance company, explaining that such a result was "plainly unconstitutional." And in *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984), the Court reaffirmed the principle that "[e]ach

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[7] The Eighth Circuit's reliance on the fact that Dassault and Falcon Jet had several overlapping officers and directors (App., *infra*, 7a) as a basis for attributing Falcon Jet's Arkansas contacts to Dassault also ignores "time-honored common-law" principles. *Bestfoods*, 524 U.S. at 70. As this Court explained in *Bestfoods*, "it is entirely appropriate" and "normal" for "directors of a parent company to serve as directors of a subsidiary" and "courts generally presume that * * * directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary." *Id.* at 69 (internal quotations omitted).

defendant's contacts with the forum State must be assessed *individually*," holding that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary." *Id.* at 781 n.13 (emphasis added).

Finally, the Eighth Circuit's attribution holding is wrong because it would allow the protections conferred by the Due Process Clause on foreign corporations to be circumvented easily. Under the Eighth Circuit's approach, there is no longer any need to show "minimum contacts" with a forum State before compelling a non-U.S. corporation with no contacts of its own with the State to appear and defend litigation there – as long as the absent corporate parent has a relationship that can be characterized as "synergistic" or "symbiotic" with a subsidiary that operates in the forum. That cannot be right. Corporations do not forfeit constitutional protections merely because they have a "synergistic" relationship to a subsidiary.

2. Equally flawed is the Eighth Circuit's multi-factor "balancing" test for determining the due process limits on personal jurisdiction. As explained above (at 17-20), the court of appeals' approach is mistaken because it is squarely at odds with this Court's decisions in at least three respects. The Eighth Circuit's surprisingly casual treatment of comity concerns (despite this Court's contrary instructions in *Asahi*), and its failure to treat the threshold inquiry into "minimum contacts" as distinct from the fairness inquiry, are serious errors.[8]

Particularly troubling is the Eighth Circuit's refusal to analyze specific and general jurisdiction separately. See note 1, *supra*. Because due process places different limits on the

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[8] Moreover, in combining the two-stage *International Shoe* inquiry into a single balancing test, the Eighth Circuit relied on the "fairness" considerations as *affirmative reasons* why due process would allow the assertion of jurisdiction over Dassault in Arkansas. But the "fair play and substantial justice" factors are aimed at uncovering situations where jurisdiction may *not* be exercised *even though* the defendant has "minimum contacts" with the forum (the minimum nexus required by the Constitution). Thus, the Eighth Circuit turned the "fairness" inquiry on its head.

exercise of general and specific jurisdiction, an analysis of personal jurisdiction that employs neither the proper test for general jurisdiction nor the proper test for specific jurisdiction is constitutionally defective. Moreover, the Eighth Circuit's refusal to apply this settled distinction leaves defendants such as petitioner to guess as to the basis on which personal jurisdiction has been exercised – and the ramifications of a ruling upholding the assertion of jurisdiction.[9]

Finally, the Eighth Circuit's multi-factor test should be rejected because it does not adequately cabin state adjudicative authority – and indeed is so vague and indeterminate that it amounts to a judicial blank check. If permitted to stand, the Eighth Circuit's decision will seriously undermine the "degree of predictability to the legal system" that is necessary to "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297 (internal quotations omitted).

3. The Eighth Circuit's ultimate determination that due process allows the assertion of personal jurisdiction over Dassault is also mistaken. The record in this case demonstrates that Anderson did not, and could not, meet her heavy burden regarding general jurisdiction. As the district court correctly noted (App., *infra*, 15a), Dassault has *none* of the traditional indicia of corporate "presence" in Arkansas. Indeed, as both the district court and Eighth Circuit acknowledged (*id.* at 3a, 15a), Dassault has *no* direct contacts with Arkansas – let alone the "continuous" and "systematic" contacts required (*Helicopteros*, 466 U.S. at 416 n.9) for the assertion of general jurisdiction. Once the panel's erroneous attribution of *Falcon Jet*'s contacts to Das-

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[9] The implications of a decision upholding specific and general jurisdiction are significantly different. Because general jurisdiction allows a State to entertain *any and all* claims against a defendant – even those unrelated to forum contacts – a decision upholding general jurisdiction has potentially far-reaching ramifications. In contrast, the exercise of specific jurisdiction has much more limited implications for the defendant's susceptibility to litigation in the forum.

sault is set to one side, as it must be, there is no conceivable basis for general jurisdiction.[10]

Nor is there any valid basis for asserting specific jurisdiction in this case. It is undisputed that Dassault designed, manufactured, and sold the aircraft in France, that the accident occurred in Michigan, that the alleged injuries were suffered by a Michigan resident, and that the circumstances surrounding the relevant flight had absolutely no connection to Arkansas. Thus, respondent cannot possibly demonstrate that her product liability claim "arose out of" or "related to" any contacts that Dassault had with Arkansas.

III. This Case May Also Provide An Opportunity To Clarify The "Stream Of Commerce" Theory

In the lower courts, Anderson unsuccessfully argued that *in personam* jurisdiction could be exercised over Dassault based on the "stream of commerce" theory – a type of specific jurisdiction that has been recognized in cases involving product manufacturers whose goods travel into the forum and cause injuries there. Dassault anticipates that if review is granted Anderson will renew this argument as an alternative basis for affirmance. Because of that possibility, this case may present an opportunity for this Court to dispel additional confusion concerning the legitimacy and meaning of this jurisdictional theory.

The "stream of commerce" theory was first discussed by this Court in *World-Wide Volkswagen*, which held that the Oklahoma courts could not exercise jurisdiction over a nonresident

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[10] At several points in its opinion, the Eighth Circuit stated that Dassault's contacts with Arkansas "go well beyond" the "mere ownership" of Falcon Jet's stock, pointing to Dassault's "establishment of a distribution system in Arkansas, and marketing its products there." App., *infra*, 5a; see also *id.* at 7a. But it was *Falcon Jet*, not Dassault, that marketed products in Arkansas, and it is difficult to see how Dassault's entry into a contractual relationship with an exclusive distributor covering the entire Western Hemisphere could qualify as an *activity* of *Dassault* in Arkansas. In any event, even if entering into a distributorship contract with Falcon Jet did qualify as an Arkansas contact, it would not come close to providing a valid basis for exercising general jurisdiction over Dassault.

retailer (World-Wide) and its wholesale distributor based on the fact that an automobile sold by the retailer in New York to New York residents was later driven to Oklahoma (where it was involved in an accident). Although the automobile's foreign manufacturer (Audi) and its U.S. importer (Volkswagen of America) were not parties to the appeal before this Court, the Court nonetheless offered this oft-cited observation:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States *if* its allegedly defective merchandise *has there been the source of injury to its owners or to others*.

444 U.S. at 297 (emphasis added); see also *Burger King*, 471 U.S. at 473 (noting, in dicta, that jurisdiction may be exercised over "'a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State' *and those products subsequently injure forum consumers*") (quoting *World-Wide Volkswagen*) (emphasis added). "[B]ecause the example used by the Court [in *World-Wide Volkswagen*] was directed at manufacturers and distributors," but "only the retail dealer and regional distributor were contesting jurisdiction," this passage "is dicta." *Ruckstuhl* v. *Owens Corning Fiberglas Corp.*, 731 So. 2d 881, 887, 889 (La.), cert. denied, 528 U.S. 1019 (1999).

In *Asahi*, 480 U.S. 102, this Court sought to clarify the *World-Wide Volkswagen* dicta, but divided 4-1-4, leaving the meaning of the "stream of commerce" theory uncertain. The Court's splintered decision in *Asahi* has generated substantial confusion and conflict.[11] As respondent acknowledged below,

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[11] Compare, *e.g.*, *Lesnick* v. *Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994) (adopting approach taken by Justice O'Connor), cert. denied, 513 U.S. 1151 (1995), with, *e.g.*, *Dehmlow* v. *Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992) (adopting approach of Justice Brennan). Still other

the Eighth Circuit has "chosen to adopt the more expansive approach reflected in Justice Brennan's opinion" instead of Justice O'Connor's more limited approach. Resp. C.A. Br. 33. Indeed, the Eighth Circuit has adopted an especially "expansive" approach (*id.* at 20) in a series of cases involving foreign manufacturers that have contracted with U.S. distributors whose territories include the forum State. See pages 7-8, *supra*.[12]

Even under the most expansive view, however, the "stream of commerce" theory requires *an injury in the forum*. That is the unmistakable import of the passages quoted above from both *Burger King* and *World-Wide Volkswagen*. See also, *e.g.*, *Bearry* v. *Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987) (exercise of jurisdiction based on "stream of commerce" theory "ensures that the contact that caused harm in the forum occurred there through the defendant's conduct and not the plaintiff's unilateral activities"). In this case, however, the accident involving respondent did not occur in Arkansas but rather in Michigan. For that reason, both the district court and the Eighth Circuit properly declined to rely on the "stream of commerce" theory. Nonetheless, we assume that if review is granted respondent will renew this argument. That might permit this Court, if it wished, to clarify the meaning of the "stream of commerce" theory.

CONCLUSION

The petition for a writ of certiorari should be granted.

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courts, in the face of the fractured *Asahi* vote, have "continued to apply" the dicta in *World-Wide Volkswagen*. See *Vermeulen* v. *Renault U.S.A., Inc.*, 985 F.2d 1534, 1548 n.17 (11th Cir.), cert. denied, 508 U.S. 907 (1993) (collecting cases). The Louisiana Supreme Court has treated the continuing validity, and meaning, of the "stream of commerce" theory as an open issue since there is "no Supreme Court precedent that guides us." *Ruckstuhl*, 731 So. 2d at 889. This disarray has been widely acknowledged. See, *e.g.*, *id.* at 887 n.5. Respondent acknowledged it below. Resp. C.A. Br. 30.

[12] The record shows that Falcon Jet sold the subject aircraft to Amway through its regional sales manager whose territory included Ohio, Michigan and Indiana, but not Arkansas. C.A. App. 20.

Respectfully submitted,

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AUGUST 2004

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 03-2422

Beverly Anderson,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the Eastern
	*	District of Arkansas.
Dassault Aviation,	*	
	*	
Appellee.	*	

Submitted: January 16, 2004

Filed: March 4, 2004

Before WOLLMAN, MORRIS SHEPPARD ARNOLD, and COLLOTON, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is a product liability suit brought by Beverly Anderson, a Michigan resident, to recover for injuries that she suffered while working as a flight attendant on a Dassault Falcon business jet owned by her employer, Amway Corporation. The jet was on its descent into a Michigan airport when it underwent a series of pitch oscillations, allegedly buffeting Ms. Anderson about in the aircraft and causing her injuries. The jet was manufactured in France by Dassault Aviation, a French

corporation. Business jets manufactured by Dassault Aviation, which account for the majority of the company's revenue, are sold under the trade name Falcon, and are exclusively sold and leased in the western hemisphere by Dassault Falcon Jet Corporation, which is a wholly owned subsidiary of Dassault Aviation. (Dassault Aviation and various of its subsidiaries, including Dassault Falcon Jet, are known collectively as Dassault Aviation Group.) Dassault Falcon Jet bought the jet on which Ms. Anderson was injured from Dassault Aviation in France, and then flew the jet to Little Rock, Arkansas, where it completed the jet and sold and delivered it to Amway.

Ms. Anderson initially filed suit in the Western District of Michigan against Dassault Aviation, Dassault Falcon Jet, and Honeywell, Inc. (which manufactured the autopilot in the jet). The Michigan district court granted Dassault Aviation's motion to dismiss for lack of personal jurisdiction, leaving Ms. Anderson's action against Honeywell and Dassault Falcon Jet pending there. Ms. Anderson then re-filed the suit against Dassault Aviation in the Eastern District of Arkansas. The Arkansas district court granted Dassault Aviation's motion to dismiss for lack of personal jurisdiction, from which Ms. Anderson now appeals. We review the dismissal for lack of personal jurisdiction *de novo*. *See Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 612 (8th Cir. 1994), *cert. denied*, 513 U.S. 948 (1994). Because we conclude that Dassault Aviation has sufficient contacts with Arkansas to subject it to personal jurisdiction there consistent with due process, we reverse.

I.

In a diversity action, a federal court may assume jurisdiction over a nonresident defendant only if the requirements of the forum state's long-arm statute are satisfied and the exercise of jurisdiction comports with due process. *See Burlington Indus., Inc. v. Maples Indus., Inc.*, 97 F.3d 1100, 1102 (8th Cir. 1996). Arkansas's long-arm statute, Ark. Code Ann. § 16-4-101, gives the state's courts personal jurisdiction over persons and claims

"to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution." The only issue in this appeal is thus whether the due process clause permits an Arkansas court's assertion of personal jurisdiction over Dassault Aviation.

In order for an Arkansas court to assert personal jurisdiction over Dassault Aviation consistent with due process, Dassault Aviation must "have certain minimum contacts" with Arkansas "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Dassault Aviation's contacts with Arkansas must be sufficient to cause it "reasonably [to] anticipate being haled into court there." *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Whether due process is satisfied depends not only on the quantity of contacts that Dassault Aviation has with Arkansas, but also on the "quality and nature" of those contacts, *see International Shoe*, 326 U.S. at 319. In assessing the nature of the contacts between Dassault Aviation and Arkansas, appropriate circumstances to consider include the burden on Dassault Aviation of litigating the case in Arkansas, the interest of Arkansas in adjudicating the dispute, Ms. Anderson's interests in obtaining convenient and effective relief, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies." *See Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990).

II.

A.

Dassault Aviation's contacts with Arkansas result, in large part, from its business relationship with Dassault Falcon Jet, which operates a large production site in Little Rock that completes Falcon jets to customers' specifications. The district

court determined that Dassault Aviation itself was neither present nor doing business in Arkansas, and that Dassault Falcon Jet's activities there were relevant to the jurisdictional inquiry only if Ms. Anderson could "pierce the corporate veil" and show that Dassault Aviation's wholly owned subsidiary was actually its "alter ego." Concluding that Dassault Aviation did not sufficiently control and dominate the affairs of Dassault Falcon Jet to allow Dassault Falcon Jet's corporate existence to be disregarded, the district court granted Dassault Aviation's motion to dismiss for lack of personal jurisdiction.

The district court relied on *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 645-47 (8th Cir. 2003), in which we held that a holding company which owned stock in various companies, including a title and guaranty company, was not subject to personal jurisdiction in Arkansas based on the title and guaranty company's Arkansas activities. Dassault Aviation contends that we established a bright-line rule in *Epps* under which, when asking whether assertion of personal jurisdiction over a parent corporation comports with due process, the activities of the parent's subsidiary must be entirely disregarded unless the subsidiary's corporate veil can be pierced under state law. We did note in *Epps* that the plaintiffs were unable to pierce the subsidiary's corporate veil. *See id.* at 650. But in reaching our conclusion that the holding company's "mere ownership of [the title and guaranty company] is too distant and limited a contact with Arkansas to justify subjecting it to the District Court's exercise of personal jurisdiction," *id.*, we also noted that the "circumstances in each case must be examined to determined whether a corporation through the activities of another corporation has subjected itself to jurisdiction in a state under its long arm statute," *id.* at 649 (internal quotations omitted).

We think that the district court placed undue reliance on the principle of piercing the corporate veil. Determining the propriety of jurisdiction at a particular place always involves applying principles of fairness and reasonableness to a distinct

set of facts, and the determination is not readily amenable to rigid rules that can be applied across the entire spectrum of cases. In any event, this case is clearly distinguishable from *Epps*, because, as discussed below, Dassault Aviation's contacts with Arkansas go well beyond "mere ownership" of Dassault Falcon Jet. We agree with Ms. Anderson that neither physical presence in Arkansas nor piercing Dassault Falcon Jet's corporate veil is required to establish the minimum contacts necessary for the exercise of personal jurisdiction in Arkansas. Dassault Aviation's establishment of a distribution system in Arkansas, and marketing its products there, are matters that we may appropriately consider in determining whether the assertion of personal jurisdiction in Arkansas comports with due process.

B.

We conclude that Dassault Aviation has sufficient contacts with Arkansas to support an Arkansas court's assertion of personal jurisdiction over it whether or not Dassault Falcon Jet is its alter ego. Dassault Aviation and Dassault Falcon Jet have a close, synergistic relationship that is not an abuse of the corporate organizational form, but is clearly relevant to the jurisdictional question. The majority of jets sold worldwide by Dassault Aviation fly in and out of Arkansas to be completed to the specifications of consumers at the Dassault Aviation Group's largest production site by Dassault Aviation's wholly owned subsidiary and exclusive distributor of business jets in the western hemisphere. We think that it is contrary to common sense to maintain that Dassault Aviation's nexus to the state of Arkansas is so minimal that it is not amenable to suit there.

Dassault Aviation benefits greatly from Dassault Falcon Jet's exclusive distribution of its business jets throughout the western hemisphere, and Dassault Aviation has a clear awareness of and interest in its subsidiary's substantial operations in Arkansas. Dassault Aviation states in its 2001 annual report that *"Dassault Aviation* has been present particularly in the US since the start of the 1970s through its specialized Falcon subsidiary – Dassault Falcon Jet – which has

three offices in Teterboro (New Jersey), Little Rock (Arkansas) and Wilmington (Delaware). The Group's largest production site is in Little Rock." (Emphasis added.) Thus, Dassault Aviation touts in its own annual report that its "presence" in the United States has been especially significant in the state of Arkansas.

A website operated and administered jointly by Dassault Aviation and Dassault Falcon Jet (www.dassaultfalcon.com) includes a "time line," which purportedly chronicles the companies' "fascinating cavalcade of milestones" and their "Tradition of Excellence." The two companies provide the following information in their 1995 entry: "Continuing the consolidation effort, Dassault Falcon Jet now completes all new Falcon business jets at its plant in Little Rock, where a major standard for Falcon customers in both hemispheres." The 1998 entry states: "Major expansion brings Dassault Falcon Jet Little Rock to almost half a million square feet – and boosts the center's production capacity to over 60 new aircraft completions per year. Little Rock is now the main completion center for all Falcon jets worldwide." The time line also reports that the Little Rock facility by 1998 "employ[ed] more workers than any single Dassault Aviation plant in France."

The companies' website explains the role of the Little Rock completion center, stating that "Falcons are manufactured in France, then flown in 'green' condition to the completion center where optional avionics and a custom interior are installed, and the exterior is painted." Jets sold to customers by both Dassault Aviation and Dassault Falcon Jet are flown in and out of the Little Rock completion center. Dassault Aviation itself paid over $126 million to Dassault Falcon Jet in the seven years preceding the filing of this action for completions done in Little Rock to Falcon jets that Dassault Aviation then sold to other parties. The companies indicate their pride in the Arkansas facility and its importance to their success by noting on their website that the Little Rock completion center is "one of the best-equipped and most efficient facilities anywhere – the envy

of the completion industry – another testament to the Dassault Falcon passion." ("Dassault Falcon" is the name of the division of Dassault Aviation that specializes in Falcon business jets; Dassault Aviation's other division, called "Dassault Defense," focuses on military programs.)

Because the two companies have a closely intertwined business relationship, Dassault Aviation's nexus with Arkansas and the Little Rock completion center goes well beyond mere ownership of Dassault Falcon jet stock. This is not a situation in which Dassault Aviation simply placed the jet at issue "into the stream of commerce" which fortuitously swept it into Arkansas. Dassault Aviation bought what is now Dassault Falcon Jet in 1994, and since then has consistently acted to consolidate the image and operations of the two companies. The companies acknowledge that as early as 1995 they were "[c]ontinuing the consolidation effort" by making "[q]uality Little Rock completions . . . standard for Falcon customers in both hemispheres." In a 2001 press release, Dassault Falcon Jet, discussing the Dassault Aviation Group, states that "[g]roup synergy is viewed as an important key to competitiveness." The group is able to achieve such synergy, in part, because the directors of the two companies overlap: both the CEO and the President of Dassault Falcon Jet are also officers and directors of Dassault Aviation. (The CEO of Dassault Falcon Jet receives all of his compensation from Dassault Aviation.)

Both companies use the word "Dassault" in their name, and they utilize a common logo. As the head of the Dassault Falcon division of Dassault Aviation (who is also Dassault Falcon Jet's CEO) testified, the companies "unify the efforts of both Dassault Aviation and Dassault Falcon Jet to create this brand and logo image." As discussed above, the companies share a website. They also jointly put together a publication entitled "Falcon Operator Directory," which lists seventeen Dassault jets owned and operated by persons or companies in Arkansas. The directory also gives contact information for a "field service representative" in Little Rock who provides services and

information to Falcon operators in Arkansas, an "authorized service center" for Falcon jets in Little Rock, and a designated salesperson for potential Arkansas customers. The two companies also jointly publish and disseminate publications entitled "Worldwide Customer Service" and "Falcon Operator Services Guide," both of which provide contact information for a representative in Arkansas, and a customer service newsletter entitled "Update," which includes Arkansas-related Falcon news. It is readily apparent from the jointly produced website and publications, and the similarities in names and logos, that the two companies utilize a unified marketing strategy. Part of this unified strategy includes highlighting the activities of the Little Rock completion center and marketing various Falcon jet services to Arkansas customers.

We have stated that "a foreign manufacturer that successfully employees one or two distributors to cover the United States intends to reap the benefit of sales in every state where those distributors market." *Clune v. Alimak AB*, 233 F.3d 538, 544 (8th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001). Dassault Falcon Jet not only marketed and sold products in Arkansas, but it operated the Dassault Aviation Group's largest production facility there. We conclude that Dassault Aviation "purposefully directed its products to the United States," and specifically to Arkansas, where most Falcon jets are completed, "through the distribution system it set up in this country." *See id.* Dassault Aviation clearly intended to reap the benefits of Dassault Falcon Jet's substantial presence in Arkansas, as is made clear in the statements from its annual report and the website that it co-operates. Given the central importance of the Little Rock completion center to the success of Dassault Aviation's worldwide sales of business jets, and Arkansas's specific and identifiable role in Dassault Aviation's unified marketing endeavors with Dassault Falcon Jet, it would not violate traditional notions of fair play and substantial justice for an Arkansas court to assert personal jurisdiction in this action.

C.

In addition to Dassault Aviation's substantial nexus with Arkansas and the Little Rock completion center, we note that other considerations here also support the exercise of personal jurisdiction in Arkansas. For one thing, we are not convinced that an Arkansas forum would be especially inconvenient for Dassault Aviation. Though the distance between France and Arkansas is substantial, we presume that Dassault Aviation has ready access to air transportation for conveniently making the trip. Arkansas contains one of the central hubs of the Dassault Aviation Group, and is already visited frequently by employees of Dassault Aviation (including the two officers common to both Dassault Falcon Jet and Dassault Aviation). Furthermore, Arkansas has a substantial interest in the matter to be litigated, as the safety of Falcon jets affects the state's consumers and workers who encounter Dassault Aviation's products. Though the injury did not occur in Arkansas, and Ms. Anderson is not an Arkansas resident, the jet at issue here was completed and delivered to its buyer in Arkansas, as are many other Falcon jets. Finally, Ms. Anderson likely has no other forum available to her in this country for her suit against Dassault Aviation. Her action was dismissed in Michigan (where the accident occurred), and Arkansas (where the jet was sold) seems to be the sole remaining logical and convenient place for the litigation to proceed.

III.

In sum, the symbiotic relationship between Dassault Aviation and Dassault Falcon Jet, coupled with the acknowledged importance of Arkansas's production site and Falcon customers to both companies' success, leads us to conclude that an Arkansas court's assertion of jurisdiction over the instant action would be reasonable and fair. We therefore vacate the judgment of the district court and remand the cause for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[FILED:
APRIL 29 2003]

BEVERLY ANDERSON,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	4:02cv00629 SWW
	*	
DASSAULT AVIATION,	*	
	*	
Defendant.	*	

MEMORANDUM AND ORDER

Beverly Anderson ("Anderson"), a flight attendant on a jet manufactured by Dassault Aviation, a French corporation headquartered in Paris, France, brings this action against Dassault Aviation seeking damages for injuries she claims to have suffered when the jet underwent a series of pitch oscillations while on a flight from Portland International Airport in Oregon to Kent County International Airport in Michigan. The matter is before the Court on motion of Dassault Aviation to dismiss for lack of personal jurisdiction [doc.#2]. Anderson has responded in opposition to Dassault Aviation's motion, and Dassault Aviation has filed a reply to Anderson's response. Having carefully considered the matter, the Court finds that Dassault Aviation's motion to dismiss for lack of personal jurisdiction should be and hereby is granted.

I.

According to the complaint, on October 10, 1999, Anderson, a Michigan resident, was a flight attendant on a Dassault Falcon 900B jet, which was owned by her employer,

Amway Corporation, a Michigan corporation. The jet was approaching its intended destination, Grand Rapids Michigan, when the pilot pulled back on the controls in an effort to disengage the autopilot and level off the aircraft. The digital flight computer responded to this external pitch up maneuver by initiating a nose down trim motion. The combination of these two events caused the jet to undergo a series of pitch oscillations between a 3-degree aircraft nose up and a 4.5 degree aircraft nose down. Anderson, who was in the galley readying the plane for landing when the pitch oscillations occurred, was thrown about in the jet, causing her to violently bounce off the floor and ceiling several times, resulting in severe injuries.

Anderson filed suit in the United States District Court for the Western District of Michigan against Dassault Aviation, as well as Honeywell, Inc., a corporation headquartered in Minnesota at the time of the accident and the manufacturer of the autopilot,[1] and Dassault Falcon Jet Corporation, a wholly-owned subsidiary of Dassault Aviation headquartered in New Jersey that sells and supports Dassault Falcon Jets throughout North and South America and the Pacific Rim countries of Asia, including the People's Republic of China. Dassault Aviation subsequently filed a motion to dismiss for lack of personal jurisdiction. Anderson responded in opposition to Dassault Aviation's motion and also requested that the entire action be transferred to Arkansas, where Dassault Falcon Jet Corporation operates a large "completion center and service base."

By Order dated October 4, 2002, the district court granted Dassault Aviation's motion to dismiss for lack of personal jurisdiction and denied without prejudice Anderson's motion to transfer the action to Arkansas. *See Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D. Mich. Oct. 4, 2002). In so ruling, the district court stated that "[i]n the event Plaintiff is successful in establishing that Dassault Aviation is subject to

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[1] Honeywell has since established its headquarters in New Jersey following a merger.

personal jurisdiction in Arkansas, Plaintiff may renew her request for transfer as to the remaining Defendants in this case." *Id.*

On October 10, 2002, Anderson filed suit against Dassault Aviation in this Court, asserting that the jet manufactured and sold by Dassault Aviation was in a defective condition which rendered it unreasonably dangerous, and that Dassault Aviation is strictly liable for her damages as a supplier of a defective product. Anderson's action against Honeywell, Inc. and Dassault Falcon Jet Corporation remains pending in the Western District of Michigan, apparently awaiting a ruling from this Court on whether Dassault Aviation is subject to personal jurisdiction in Arkansas.[2]

II.

Dassault Aviation argues dismissal for lack of personal jurisdiction is warranted because the cause of action occurred in Michigan, Anderson is a Michigan resident, Anderson's medical treatment occurred in Michigan where she resides, and Dassault Aviation is a French corporation having no contacts with Arkansas sufficient to support general jurisdiction consistent with the limitations placed upon the Court by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Arkansas's long-arm statute, Ark. Code Ann. § 16-4-101.

A.

This Court applies a two-part test to the jurisdictional issue. First, whether the forum state's long-arm statute is satisfied, and second, whether the exercise of jurisdiction comports with due process. *Oriental Trading Co., Inc. v. Firetti*, 236 F.3d 938 (8th

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[2] According to pleadings in the Michigan litigation, Dassault Aviation has been served in France in accordance with the requirements of the Hague Convention. *See Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D. Mich.) (Pl. Br. at 2 (10-3-03)).

Cir. 2001); *Clune v. Alimak AB*, 233 F.3d 538, 541 (8th Cir. 2000). Arkansas's long-arm statute gives courts personal jurisdiction of all persons and causes of action "to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution." Ark. Code Ann. § 16-4-101. Accordingly, as the Arkansas long-arm statute covers those cases where the Due Process Clause permits the assertion of personal jurisdiction, the only question for this Court is whether the exercise of personal jurisdiction in this case comports with due process. *Firetti*, 236 F.3d at 943; *Clune*, 233 F.3d at 541. *See also Epps v. Stewart Information Services Corp.*, — F.3d —, 2003 WL 1699904 at *3 (8th Cir. Apr. 1, 2003) (applying Arkansas law); *Dean v. Olibas*, 129 F.3d 1001, 1003-04 (8th Cir. 1997) (same); *Burlington Industries, Inc. v. Maples Industries, Inc.*, 97 F.3d 1100, 1102 (8th Cir. 1996) (same).

The Due Process Clause establishes the parameters of a state's power to assert personal jurisdiction over a nonresident defendant. *Clune*, 233 F.3d at 541. In this respect, due process requires that the defendant have sufficient "minimum contacts" with the forum state "so that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Stewart Information Services*, — F.3d —, 2003 WL 1699904 at *3 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980)). The defendant's conduct and connection with the forum state must be such that defendant should "reasonably anticipate being haled into court there." *Burlington Industries*, 97 F.3d at 1102. *See also Dakota Industries, Inc. v. Ever Best Ltd.*, 28 F.3d 910, 915 (8th Cir. 1994) (noting that "[s]ufficient contacts exist when an individual's connection with the forum state does not offend traditional notions of fair play and substantial justice and the defendant purposefully avails himself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws'"). "This 'fair warning' requirement is satisfied if the defendant[s] ha[ve] 'purposefully directed' [their] activities at residents of the forum . . . , and the litigation results from alleged injuries that

'arise out of or relate to' those activities . . . ." *Firetti*, 236 F.3d at 943 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The Eighth Circuit has established a five-factor test to determine the sufficiency of a defendant's contacts: (1) the nature and quality of contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties. *Burlington Industries*, 97 F.3d at 1102. *See also Davis v. St. Johns Health System, Inc.*, 348 Ark. 17, 24, 71 S.W.3d 55, 59 (Ark. 2002) (viewing five-factor test adopted by the Eighth Circuit in *Burlington Industries* "as helpful"). The first three factors are of primary importance. *Burlington Industries*, 97 F.3d at 1102. The Eighth Circuit has further elaborated on the third factor – the relationship of the cause of action to the contacts – to distinguish between specific jurisdiction, which refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state, and general jurisdiction, which refers to the power of a state to adjudicate any cause of action involving a particular defendant regardless of where the cause of action arose and irrespective of the relationship between the cause of action and the contacts. *Id.* at 1102-03. *See also Stewart Information Services*, — F.3d —, 2003 WL 1699904 at *3. When general jurisdiction is in question, defendant may be subject to the forum state's exercise of personal jurisdiction if contacts with the state are continuous and systematic. *Id.*[3]

The plaintiff has the burden to show personal jurisdiction exists. *Burlington Industries*, 97 F.3d at 1102; *Stewart Information Services*, — F.3d —, 2003 WL 1699904 at *2. The plaintiff, however, need only make a *prima facie* showing of jurisdiction. *Dakota Industries*, 946 F.2d at 1387. If the court

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[3] Anderson asserts that jurisdiction over Dassault Aviation is present under both general and specific jurisdiction. *See* Br. in Supp. of Pl.'s Resp. Resp. to Dassault Aviation's Mot. to Dismiss at 18 n. 8.

does not hold a hearing and instead relies on pleadings and affidavits, as is the case here, the court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party. *Id.*

B.

The Court has carefully considered the matter and finds that Anderson has not made a *prima facie* showing of personal jurisdiction over Dassault Aviation. It is undisputed that Dassault Aviation *itself* was neither present nor doing business in Arkansas. In this respect, Anderson does not dispute that Dassault Aviation is a French Corporation and is not qualified or licensed to do business in the State of Arkansas; that it maintains no offices in the State of Arkansas and owns no real or personal property in the State of Arkansas; that it does not maintain an agent for service of process in the State of Arkansas; that it does not have a telephone listing in the State of Arkansas; that it does not have any warehouse or manufacturing facilities in the State of Arkansas; that it does not have a bank account in the State of Arkansas; that it does not insure any person in the State of Arkansas; that it does not enter into any contracts to furnish goods or products in Arkansas; and that it has not consented to be haled into court in Arkansas. Bertaux Aff. at ¶¶ 2-13 (Ex. B, Dassault Aviation's Mot. to Dismiss). Rather, Anderson's argument is that Dassault Aviation "has progressively adopted a course of action to purposefully blur the distinction between [Dassault Aviation] and its exclusive distributor and wholly owned subsidiary, Dassault Falcon Jet," Br. in Supp. of Resp. to Dassault Aviation's Mot. to Dismiss at 12, that Dassault Falcon Jet Corporation's activities are "imputed" to Dassault Aviation, *id.* at 13, that Dassault Aviation and Dassault Falcon Jet Corporation share two officers, *id.* at 12, and that "[t]he business jet in this case was 'completed' *and* delivered in Little Rock, Arkansas to Ms. Anderson's employer." *Id.* at 2 (emphasis in original).[4]

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[4] Anderson's argument, then, reduced to its essence, is that Dassault

i.

In situations in which the defendant is a nonresident parent corporation, "personal jurisdiction can be based on the activities of the nonresident corporation's in-state subsidiary, but only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate exercise was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's ego." *Stewart Information Services*, — F.3d —, 2003 WL 1699904 at *4 (citing *Contractors, Laborers, Teamsters & Engineers Health Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519

Falcon Jet Corporation is an "alter ego" of Dassault Aviation, although she does not use that specific term in this litigation. In the Michigan litigation, Anderson argued that "[p]ersonal jurisdiction over defendant, Dassault Aviation, does not arise out of the mere contention that Defendant's subsidiary is Defendant's 'alter ego'; rather, it is well established that Defendant's subsidiary is the sole distributor of Defendant's business and private aircraft in the United States." *Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D. Mich.) (Pl.'s Br. at 5) (3-14-02)). Similarly, Anderson's central argument in the instant litigation is that "Dassault's activities within Arkansas, both independently and through its wholly owned subsidiary/exclusive distributor has been consistent, systematic and substantial for years . . ." Br. in Supp. of Pl.'s Resp. to Dassault Aviation's Mot. to Dismiss at 9. However, Anderson's argument and supporting evidence refers only to activities conducted by Dassault Falcon Jet Corporation and not Dassault Aviation. That being so, and based on the Eighth Circuit's recent opinion in *Stewart Information Services* — F.3d —, 2003 WL 1699904, this Court construes Anderson's argument as being that the acts of Dassault Falcon Jet Corporation are those of Dassault Aviation – that the distinction between the two corporations has been "blur[red]" and that Dassault Aviation controls the operational minutia of its wholly owned subsidiary, Dassault Falcon Jet Corporation, such that the latter's acts may be "imputed" to Dassault Aviation. In other words, what is in essence an "alter ego" argument.

F.2d 634, 637 (8th Cir. 1975)). In order to prevail, Anderson must show by "clear proof" that Dassault Aviation "so controls the 'operational minutia' of its subsidiaries that have minimum contacts with Arkansas that [Dassault Aviation] itself can be said to be doing business in Arkansas." *Id.* at *2. "If the resident subsidiary corporation is the alter ego of the nonresident corporate defendant, the subsidiary's contacts are those of the parent corporation's, and due process is satisfied." *Id.* at *4 (citing *Lakota Girl Scout Council*, 519 F.2d at 637). As the Eighth Circuit has noted,

> [a] corporation is not doing business in a state merely by the presence of its wholly owned subsidiary. *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S. Ct. 250, 69 L.Ed. 634 (1925). However, the fiction of corporate entity may be disregarded, where one corporation is so organized and controlled and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation. *Even a non-owned corporation may act as an agent for another corporation.* No all embracing rule has been laid down under which the relationship between two corporations may be determined. The circumstances in each case must be examined to determine whether a corporation through the activities of another corporation has subjected itself to jurisdiction in a state under its long arm statute.

Stewart Information Services, — F.3d —, 2003 WL 1699904 at *4 (quoting *Lakota Girl Scout Council*, 519 F.2d at 637, and adding emphasis).

In view of these principles, a court's assertion of jurisdiction is contingent on the ability of Anderson "to pierce the corporate veil." *Id.* State law is viewed to determine whether and how to pierce the corporate veil. *Id.* "The Arkansas courts have stated that the doctrine of piercing the corporate veil is founded in equity and is applied when the facts warrant its application to prevent injustice." *Id.* (citing *Humphries v. Bray*, 611 S.W.2d 791, 793 (Ark. Ct. App. 1981)). "Piercing the fiction of a

corporate entity should be applied with great caution." *Id.* (citing *Banks v. Jones*, 390 S.W.2d 108, 111 (Ark. 1965)). A parent corporation is not liable for the debts of its subsidiaries merely because the parent corporation holds the controlling interest or because the two are managed by the same officers. *Id.* (citing *Rounds & Porter Lumber Co. v. Burns*, 225 S.W.2d 1, 2 (Ark. 1949)). "Rather, it is only when the privilege of transacting business in corporate form has been illegally abused to the injury of a third person that the corporate entities should be disregarded." *Id.*

ii.

As previously noted, it is undisputed that Dassault Aviation itself was neither present nor doing business in Arkansas – it has no place of business, mailing address, personal property, agent for service of process, etc., to connect the corporation directly to the state. In addition, notwithstanding Anderson's argument that Dassault Aviation has purposefully "blur[red]" the distinction between Dassault Aviation and Dassault Falcon Jet Corporation, none of the evidence she has submitted – including operator directories, press releases, websites, distributorship agreements, annual reports, and financial statements – shows that Dassault Falcon Jet Corporation was controlled and manipulated by Dassault Aviation, that it had independent existence in form only, and that it was thus the mere instrumentality or alter ego of Dassault Aviation. *See In re B.J. McAdams, Inc.*, 66 F.3d 931, 937 (8th Cir. 1995) (applying Arkansas law). She has not, in other words, shown that the "parent so controlled and dominated the affairs of the subsidiary that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego," thus imputing Dassault Falcon Jet Corporation's acts to Dassault Aviation. *Stewart Information Services,* — F.3d —, 2003 WL 1699904 at *4.

It is of no import that the corporations share two officers – Jean-Francois Georges (senior vice president of civil aircraft in Dassault Aviation and Chief Executive Officer of Dassault

Falcon Jet) and Jean Rosanvallon (president of Dassault Falcon Jet and a vice president of Dassault Aviation). Merely because the two corporations are managed by the same officers does not thereby make the acts of Dassault Falcon Jet Corporation those of Dassault Aviation. *See Stewart Information Services*, — F.3d —, 2003 WL 1699904 at *4 (citing *Rounds & Porter Lumber Co.*, 225 S.W.2d at 2). Rather, the evidence of record reveals nothing more than a typical corporate relationship between a parent and its wholly owned subsidiary; the record is devoid of evidence suggesting that the Dassault Aviation disregarded Dassault Falcon Jet Corporation's corporate existence.

Turning to Anderson's argument that the jet was "completed" in Arkansas, the Court finds that this argument is misleading and of no import to the personal jurisdiction analysis as "completion" in this context refers only to the fact that the new Falcon jets are flown in "green" condition (equipped with basic avionics, but without exterior paint or passenger interior, or without optional equipment) from the factory in France to, among other places, Little Rock, Arkansas, where they are "completed" to customer specifications. Pl.'s Ex. 4 (Dassault Falcon Press Release); Pl.'s Ex. 18 (Georges Depo. at 19-20). In this respect, Anderson does not dispute that in 1994 Dassault Falcon Jet Corporation purchased the jet in France from Dassault Aviation, took title to and possession of the jet in France, and *then* brought the jet into Arkansas, "completed" it, and sold it to Anderson's employer. *See Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D. Mich. April 8, 2002) (Opinion of Quist, J.). Indeed, plaintiff acknowledged in the Michigan litigation that Dassault Falcon Jet Corporation, not Dassault Aviation, "was responsible for 'completing' the subject jet, selling the jet, and ultimately delivering same in Little Rock, Arkansas to the Amway Corporation." *Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D. Mich.) (Pl.'s Br. at 2 (10-3-03)). Thus, the fact that the jet was "completed" in Arkansas does not assist Anderson in her personal jurisdiction analysis.

Finally, the Court rejects Anderson's reliance on the Arkansas Supreme Court's recent decision in *Davis v. St. Johns Health System, Inc.*, 348 Ark. 17, 71 S.W.3d 55 (Ark. 2002). *Davis* concerned a medical malpractice case in which the plaintiff, a Missouri resident, sued a Missouri corporation, St. John's Health System, which was qualified to do business in Arkansas, in Arkansas state court after being admitted to a hospital in Arkansas for damages relating to a misdiagnosis that occurred by a Missouri doctor in a Missouri hospital owned by St. John's. The state court dismissed the case, finding that St. John's was not subject to personal jurisdiction in Arkansas. The Arkansas Supreme Court reversed based on plaintiff's allegations that St. John's operated through its subsidiary medical care facilities within Arkansas, owned substantial property within Arkansas, employed Arkansas residents and others working in Arkansas on a daily basis, and had a designated agent for service of process in Arkansas. 348 Ark. at 26-27, 71 S.W.3d at 60-61. The Arkansas Supreme Court concluded that "designating an agent for service of process in Arkansas *and* doing business in the state through a wholly owned subsidiary which entails ownership of substantial property and employment of employees in Arkansas subjects St. John's to the personal jurisdiction of our courts." *Id.* 348 Ark. at 27,71 S.W.3d at 61 (emphasis in original). Here, by contrast, there has been no showing that Dassault Aviation owns substantial property within the state, employs Arkansas residents and others working in Arkansas on a daily basis, or has a designated agent for service of process in Arkansas. Anderson's reliance on *Davis*, then, is misplaced and does not support her assertion of personal jurisdiction over Dassault Aviation.

iii.

In sum, Anderson has failed to overcome the general rule that "a parent corporation that owns a subsidiary – even wholly owns a subsidiary – is not present in the state merely because the subsidiary is there." *Stewart Information Services*, — F.3d

—, 2003 WL 1699904 at *5. Applying the five-factor test set forth in *Burlington Industries*, 97 F.3d at 1102, this Court finds Anderson has failed to link Dassault Aviation to Arkansas except as a parent corporation and that Dassault Aviation's mere ownership of Dassault Falcon Jet Corporation is insufficient to justify subjecting it to this Court's jurisdiction.

III.

For the foregoing reasons, the Court hereby grants Dassault Aviation's motion to dismiss for lack of personal jurisdiction. Judgment will be entered accordingly.

IT IS SO ORDERED this 29th day of April 2003.

/s/
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BEVERLY ANDERSON,

Plaintiff,

Case No. 1:01-CV-640

v.

HON. GORDON J. QUIST

DASSAULT AVIATION,
DASSAULT FALCON JET
CORPORATION, and
HONEYWELL, INC.,

Defendants.
----------/

ORDER

For the reasons stated in the Court's prior Opinions and Orders and on the record following oral argument by telephone on October 3, 2002, regarding Plaintiff's request for transfer,

IT IS HEREBY ORDERED that Defendant Dassault Aviation's Motion to Dismiss (docket no. 11) is **GRANTED**. Dassault Aviation is **dismissed without prejudice**.

IT IS FURTHER ORDERED that Plaintiff's request for transfer is **DENIED WITHOUT PREJUDICE**. In the event Plaintiff is successful in establishing that Dassault Aviation is subject to personal jurisdiction in Arkansas, Plaintiff may renew her request for transfer as to the remaining Defendants in this case. The Court notes that its rulings regarding the issues in this

Order do not reflect the Court's view whether Dassault Aviation is subject to personal jurisdiction in Arkansas.

Dated: October 4, 2002

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BEVERLY ANDERSON,

Plaintiff,

Case No. 1:01-CV-640

v.

HON. GORDON J. QUIST

DASSAULT AVIATION,
DASSAULT FALCON JET
CORPORATION, and
HONEYWELL, INC.,

Defendants.
----------/

MEMORANDUM ORDER

Plaintiff, Beverly Anderson, sued Defendants, Dassault Aviation ("Dassault"), Dassault Falcon Jet Corporation ("Dassault Falcon"), and Honeywell, Inc.("Honeywell"), for negligent design and manufacture of an aircraft with an incorporated digital flight guidance computer. Dassault, a French corporation, moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(2), arguing that the Court lacks personal jurisdiction over it. On April 8, 2002, the Court issued an Opinion and an Order placing the motion on the administrative docket. The Court determined that it had no general personal jurisdiction over Dassault, but directed the parties to engage in discovery regarding whether Dassault had sufficient contacts in Michigan that subject it to limited personal jurisdiction pursuant to Michigan's long-arm statute, M.C.L. § 600.715. Such

discovery has been completed and Plaintiff and Dassault have filed supplemental briefs which have been reviewed by the Court.

Once Dassault challenged the Court's jurisdiction, Plaintiff bears the burden of establishing the existence of personal jurisdiction. *Int'l Techs. Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386, 391 (6th Cir. 1997). Plaintiff may not rest on the pleadings but must set forth specific facts to demonstrate that the Court has jurisdiction. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). Pleadings and affidavits are viewed in the light most favorable to Plaintiff. *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989). Federal courts sitting in diversity must apply the law of the forum state when considering whether the exercise of personal jurisdiction is proper. *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980).

I. Sufficient Contacts

Plaintiff asserts that her tort action arose in Michigan and that this is enough to establish sufficient contacts under the long-arm statute. Plaintiff's injuries occurred in the airspace above Michigan. The aircraft she was on board was en route from Oregon to Michigan, and her injuries occurred during the plane's descent into Kent County International Airport.

In *Theunissen*, the defendant submitted an affidavit disclaiming any contacts with Michigan, the forum state. *Theunissen*, 935 F.2d at 1456-57. He was a sole proprietor operating a lumber yard in Windsor, Ontario, and claimed that he did not hold property, did not employ any person, and conducted no business in Michigan. The plaintiff responded by submitting evidence indicating that the defendant maintained an address in Michigan and had entered into contracts for sale of lumber in Michigan. The district court granted the defendant's motion to dismiss for lack of jurisdiction. On appeal, the United States Court of Appeals for the Sixth Circuit reversed, and concluded that, assuming the plaintiff's allegations were true, the defendant had maintained a residence in Michigan and

contracted with Michigan businesses. This alone was sufficient to establish jurisdiction, and the causal relationship between the plaintiff's injury and the defendant's contacts with Michigan further supported that conclusion. *Id.* at 1460-61.

In the instant case, Plaintiff has presented no evidence indicating a connection of Dassault to Michigan outside of the injury and the sale of the Dassault jet by Dassault Falcon to a corporation based in Michigan. Dassault does not have offices, employees, agents, real or personal property, bank accounts, or telephone listings in Michigan, nor has Plaintiff provided any evidence that Dassault entered into any contracts for the sale of goods or services in Michigan. Further, Dassault is not qualified or licensed to conduct business in Michigan, does not pay taxes to the State of Michigan, and does not insure any person in Michigan.

Thus, Plaintiff must establish that Dassault's involvement in the transactions and business contacts of Dassault Falcon, its wholly-owned subsidiary, brings Dassault within the long-arm statute. However, mere ownership of the subsidiary is insufficient; Plaintiff must demonstrate an alter-ego relationship or an undue amount of control (a parent company will always exercise some amount of control). *Roethlisberger v. Tokyo Aircraft Instrument Co. (TKK) of Japan*, No. 1:90-CV-885, 1992 WL 237317, at *2-3 (W.D. Mich. Jan. 13, 1992). In other words, Plaintiff must show that Dassault Falcon was a "mere instrumentality" of Dassault. *Id.* at *3 (quoting *Make v. Copper Range Co.*, 121 Mich. App. 518, 524, 328 N.W.2d 430, 433 (1982) (per curiam)). Even though Dassault Falcon was the exclusive distributor of Dassault's aircraft, and the two companies may have shared common members between the two boards of directors that is insufficient to create personal jurisdiction over Dassault. *Roethlisberger* at *3. In addition, for the relationship between Dassault and Dassault Falcon to be used by Plaintiff in this context, it has to have existed as of the date the cause of action arose or by the date the action was commenced. *Witbeck v. Bill Cody's Ranch Inn*, 428 Mich. 659,

680, 411 N.W.2d 439, 449 (1987). Thus, Plaintiff's references to a joint website and common logo are insufficient because they occurred after that time period.

Therefore, Plaintiff's alleged links between Dassault and Dassault Falcon are insufficient to persuade this Court that it should disregard the formal corporate separation between Dassault and Dassault Falcon. Plaintiff has failed to carry her burden that Dassault had sufficient contacts in Michigan that would enable the Court to exercise limited personal jurisdiction pursuant to the long-arm statute.

II. Constitutional Considerations

Assuming for the sake of argument that Dassault had sufficient contacts in Michigan, constitutional concerns of due process limit the application of Michigan's long-arm statute. *Theunissen,* 935 F.2d at 1459 (citing *Welsh*, 631 F.2d at 439). The exercise of jurisdiction, even if authorized by statute, must comport with "'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940)). The Sixth Circuit has set forth three criteria that must be met before a court will exercise personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 150 (6th Cir. 1997) (quoting *So. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). Michigan state courts undertake the same analysis. See *Jeffrey v. Rapid Am. Corp.*, 448 Mich.

178, 186, 529 N.W.2d 644, 649 (1995) (quoting *Mozdy v. Lopez*, 197 Mich. App. 356, 359, 494 N.W.2d 866, 868 (1992)).

While the Court need not go through the criteria because sufficient contacts do not exist, the Court notes that Plaintiff cannot meet the first criterion, as Dassault did not purposefully avail itself of the privilege of conducting business or causing consequences in Michigan. This requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985)(citations omitted). Dassault has never completed a sale directly to a Michigan resident; rather, Dassault sells its planes to Dassault Falcon, which, in turn, sells the planes to customers all over the United States and elsewhere. It is foreseeable that Dassault's product could ultimately cause injury in Michigan, but this is not enough to fulfill the purposeful availment criterion.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980), the Supreme Court reviewed the exercise of jurisdiction over a New York automobile distributor by an Oklahoma court. The Court concluded that even though it was foreseeable that a car sold by the distributor could end up in Oklahoma and be involved in an accident, this was insufficient for the Oklahoma court's jurisdiction. *Id.* at 295, 100 S. Ct. at 566. In a later case, Justice O'Connor, writing for a plurality, made clear that the mere act of placing a product into the stream of commerce is not a "purposeful availment" where there is no other indication that the defendant was taking advantage of the privilege of conducting business in the forum state. *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032 (1987). There must be something more, such as specific design, advertisement, or marketing directed to the forum state. *Id.* Thus, the fact that a Dassault-manufactured product was sold to a corporation in Michigan and allegedly caused an accident in the airspace over

Michigan is not enough to meet the purposeful availment requirement. See *Vargas v. Hong Jin Crown Corp.*, 247 Mich. App. 278, 9293-95, 636 N.W.2d 291, 301-02 (2001).

Therefore, Plaintiff has not met her burden of establishing that Dassault had sufficient contacts in Michigan to fall within the long-arm statute. Even if she had, constitutional considerations demonstrate that Dassault did nothing more than merely place its product into the stream of commerce.

In her supplemental brief, Plaintiff requested that the Court transfer the case to the Eastern District of Arkansas if Dassault's motion is granted. Subsequently, Plaintiff and Honeywell submitted a stipulation to the Court to defer briefing that issue, and Dassault filed a motion to defer consideration of the transfer issue, which it will oppose, until its motion to dismiss was decided. Dassault's motion to defer (docket no. 34) is **GRANTED**.

The Court defers the dismissal of Dassault Aviation as a defendant until the transfer issue can be briefed and decided. Briefs shall be submitted to the Court and served on other parties on or before **September 30, 2002**. All reply briefs shall be filed and served on or before **October 11, 2002**.

Dated: September 16, 2002 /s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2422

Beverly Anderson,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehear-
	*	ing En Banc
Dassault Aviation,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

April 9, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

(3)

Supreme Court U.S.
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No. 04-222

IN THE

Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit properly applied the United States Supreme Court's "minimum contacts" analysis in finding that the Petitioner purposefully directed its activity toward the forum State.

2. Whether the Eighth Circuit properly looked to other considerations after it had found "minimum contacts" to be present, to ensure that the exercise of personal jurisdiction over the Petitioner in Arkansas would not "offend traditional notions of fair play and substantial justice."

TABLE OF CONTENTS

Page

Questions Presented i

Table Of Contents ii

Table Of Cited Authorities v

Introduction – Why This Petition Should Be Denied 1

Factual Background 2

Argument 4

A. There is No Conflict with Holdings of this Court. The Eighth Circuit Agrees that Ownership of a Subsidiary, *Per Se*, Does Not Establish in Personam Jurisdiction. Rather, Petitioner's Own Actions were Purposefully Directed at the Forum State, and its Nexus with Arkansas Goes Well Beyond Mere Ownership of Stock in a Subsidiary. 4

1. The Eighth Circuit's Decision Below Correctly Found "Minimum Contacts" Based Upon a Careful Consideration of the Facts. 4

2. This Court's Decisions in *Asahi*, Which Featured Prominently in the Arguments Below, Support Arkansas' Exercise of Jurisdiction over Petitioner. 7

Contents

Page

3. The Eighth Circuit Acknowledged that Ownership, By Itself, of a Subsidiary is Not Enough to Establish Jurisdiction Over the Parent; the Panel Adopted this court's "Minimum Contacts" Analysis. 10

4. *International Shoe*: Due Process Allows for Establishing Jurisdiction Over a Foreign Defendant that is Not Physically Present in the Forum State. 11

5. The Eighth Circuit Appropriately Recognized that the Relationship Between Dassault Aviation and Dassault Falcon Jet Goes Well Beyond a Parent's Mere Ownership of a Subsidiary. 13

6. "More Recent Doctrinal Refinements" Support the Eighth Circuit's Finding of *In Personam* Jurisdiction over Dassault. 15

B. Contrary to the Petitioner's Claim, the Eighth Circuit Did *Not* Rely Upon a "Multi-Factor" Balancing Test, or Any other "Test," Aside from What is Required by *International Shoe*. 17

1. The Eighth Circuit Did Not Adopt a Multi-Factor Test; Its Decision is Consistent with *Burger King* and Considered "Other Factors" After Minimum Contacts Had Already Been Established. 20

Contents

Page

2. The Present Case "Arises out of, or is Related to," the Petitioner's Forum State Activity; In Any Event, Petitioner Has Had "Continuous and Systematic Contact" with Arkansas Since the 1970s. 21

3. This Court in *Burger King* Formally Endorses the Consideration of "Other Factors" Following a Finding of "Minimum Contacts." 23

C. Challenges to Jurisdiction Based on Distributorship Agreements Have Been Rejected by this Court Inasmuch as Such Jurisdiction Derives from Language Explicitly Found in *International Shoe* and *Asahi*. ... 25

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases

Aftanase v. Economy Baler Co.,
343 F.2d 187 (8th Cir. 1965) 20

Anderson v. Dassault Aviation,
361 F.3d 449 (8th Cir. Ark. 2004) ..... *passim*

Asahi Metal Indus. Co. v. Superior Court,
480 U.S. 102 (1987) ..... *passim*

Burger King Corp. v. Rudzeiwicz,
471 U.S. 462, 105 S. Ct. 2174 (1985) ..... *passim*

Burton v. Subaru of America,
646 F. Supp. 78 (N.D. Ga. 1986) 26

Cannon Mfg. Co. v. Cudahy Packing Co.,
267 U.S. 333 (1925) 10

Clune v. Alimak AB,
233 F.3d 538 (8th Cir. Mo. 2001), *cert denied*,
533 U.S. 929, 121 S. Ct. 2551 (2001) 22, 26, 27

Curtis Publishing Company v. Cassel,
302 F.2d 132 (10th Cir. Kan. 1962) 10, 12

Enterprise Rent-A-Car Co. v. U-Haul Int'l, Inc.,
327 F. Supp. 2d 1032 (E.D. Mo. July 22, 2004) 17, 18

Epps v. Stewart Information Services, Inc.,
327 F.3d 642 (8th Cir. 2003) 13

Cited Authorities

Page

Gallagher v. Mazda Motor of America, Inc.,
781 F. Supp. 1079 (E.D. Pa. 1992) 15

Gray v. Riso Kagaku Corp.,
1996 WL 181488 (4th Cir. Apr. 17, 1996) 11

Hall v. Zambelli,
669 F. Supp. 753 (S.D. W. Va. 1987) 26

Helicopteros Nacionales
De Columbia, S.A. v. Hall,
466 U.S. 408, 104 S. Ct. 1868 (1984) 21, 22

I. A. M. National Pension Fund v.
Wakefield Industries, Inc.,
699 F.2d 1254 (D.C. Dir. 1983) 11

International Shoe Co. v. Washington,
326 U.S. 310, 66 S. Ct. 154 (1945) ..... *passim*

Kulko California Superior Court,
36 U.S. 84, 98 S. Ct. 1690 (1978) 21

McGee v. International Life Ins. Co.,
355 U.S. 220, 78 S. Ct. 199 (1957) 16, 21

Milliken v. Meyer,
311 U.S. 457, 61 S. Ct. 339 (1940) 11

Nesladek v. Ford Motor Co.,
46 F.3d 734 (8th Cir.), *cert. denied*, 516 U.S. 814,
116 S. Ct. 67, 133 L. Ed. 2d 28 (1995) 22

Cited Authorities

Page

Tobin v. Astra Pharmaceutical Prod., Inc., 993 F.2d 528 (6th Cir. 1993), *cert denied sub nom. Duphar v. Tobin*, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 25, 26, 27

Warren v. Honda Motor Co., 669 F. Supp. 365 (D. Utah 1987) 26

Waters v. Deutz Corp., Del. Super., 460 A.2d 1332 (1983) 26-27

Wessinger v. Vetter Corp., 685 F. Supp. 769 (D. Kan. 1987) 26

World-Wide Volkswagen v. Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980) 16, 21, 28

Articles

Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 88-96 (1980) 16

Lea Brilmayer and Kathleen Paiseley, "Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency," 74 Cal. L. Rev. 1, 3-4 (1986), *citing* P. Blumberg, *The Law of Corporate Groups*, 43-47 (1983) ... 11

34 Seton Hall L. Rev. 807, by Charles Rhodes 15

Cited Authorities

Page

Other Authorities

Duphar v. Tobin, Respondent's Brief in Opposition, 1993 WL 13076322 (1993) 26

INTRODUCTION – WHY THIS PETITION SHOULD BE DENIED

Dassault has spent an inordinate amount of effort attempting to create for this Court the misconception of a conflict in the circuits where none exists. The Eighth Circuit's opinion is wholly consistent with the holdings of this Court, and does not raise any issues justifying the granting of the Petition for Certiorari. The present cause of action arises out of a claimed defect in a Dassault Falcon business jet that was manufactured by Petitioner, then completed and delivered to the owner/operator in Little Rock, Arkansas pursuant to a plan of marketing and distribution established by the Petitioner.

Under the uncontroverted facts, the Eighth Circuit properly found that Petitioner through its own actions had purposefully directed its products to the United States, and specifically to Arkansas, where most Falcon jets are completed, through the distribution system that the Petitioner itself established in this country. Well-settled law supports the conclusion that the Defendant purposefully availed itself of the privilege of doing business in the Arkansas forum.

The Eighth Circuit correctly held that the District Court's assertion of jurisdiction over Dassault, the manufacturer of this product, would be reasonable and fair. *Anderson v. Dassault Aviation*, 361 F.3d 449, 455 (8th Cir. Ark. 2004) The exercise of personal jurisdiction over Dassault by the State of Arkansas is predicated on the factors set forth in this Court's landmark decisions in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945); and with precedent cases within the Eighth Circuit that are likewise consonant with these and other holdings.

FACTUAL BACKGROUND

On or about October 9, 1999, while over Lake Michigan en route from Portland International Airport to Kent County International Airport, the Amway flight crew of Dassault DA-900B was authorized by air traffic control to descend to 11,000 feet MSL in preparation for landing. The flying pilot programmed the FZ800 digital flight guidance computer for this descent. As the jet neared 11,000 feet MSL, the flight crew observed that the jet was not going to capture at the appropriate altitude, so the first officer slightly pulled back on the yoke in an effort to level off. The digital flight guidance computer responded to the external slight pitch-up maneuver by initiating a nose-down trim motion. The combination of these two events caused the jet to undergo a series of violent pitch oscillations. Respondent, Beverly Anderson, was a flight attendant on board the aircraft at the time. Respondent was in the galley readying the plane for landing when the pitch oscillations occurred. She was thrown violently about the jet causing her to bounce off the floor and ceiling several times.

The Dassault Falcon 900B is only one of many jets that have been manufactured by Dassault and which have been delivered *in Arkansas* to U.S. customers. Dassault's contacts with the State of Arkansas date back several decades. Most of the contacts relate to activities through an industrial or manufacturing facility in Little Rock, Arkansas. Some of those activities have been outlined in Dassault Aviation's web site, where a timeline has been published. By 1995, "[q]uality Little Rock completions are . . . standard for Falcon customers *in both hemispheres*" [emphasis added] including those jets being sold directly by Dassault itself. By 1998, Little Rock was the "main completion center for all Falcon jets worldwide." The timeline reports that the Little Rock facility "occupies almost half a million square feet and employs more workers than any single Dassault Aviation plant in France."

Dassault's presence in the United States and Arkansas through its business jets sold under the trade name Falcon is incontrovertible inasmuch as Dassault *touts* it:

> Dassault Aviation has been present *particularly in the United States* since the start of the 1970's through its specialized Falcon subsidiary — Dassault Falcon Jet — which has three offices in Teterboro (New Jersey), *Little Rock (Arkansas)* and Wilmington (Delaware). *The Group's largest production site is in Little Rock.*

(Emphasis Added). Dassault Aviation's business jets are manufactured for, and completed in, the United States and Arkansas. These jets are delivered from France to the Group's completion and distribution center in Little Rock. Although "flight-ready" before they are flown to Arkansas, they are *completed* at the facility in Arkansas. Specifically, the exterior paint job is applied, internal furnishing and passenger seating is installed, advanced avionics, such as collision avoidance systems, and other options are installed, before the aircraft is ready to be delivered to the customer. The Group's facility in Little Rock is identified as a "Dassault" manufacturing facility, where the Dassault Falcon 900B was completed prior to being sold to its first customer.

ARGUMENT

A. There is No Conflict with Holdings of this Court. The Eighth Circuit Agrees that Ownership of a Subsidiary, *Per Se*, Does Not Establish *in Personam* Jurisdiction. Rather, Petitioner's Own Actions were Purposefully Directed at the Forum State, and its Nexus with Arkansas Goes Well Beyond Mere Ownership of Stock in a Subsidiary.

1. The Eighth Circuit's Decision Below Correctly Found "Minimum Contacts" Based Upon a Careful Consideration of the Facts.

Dassault's Petition for a Writ of Certiorari is grounded on the over-riding, yet false, premise that the Eighth Circuit concluded that jurisdiction was present merely upon the basis of Dassault's ownership of a subsidiary that is present and active in the forum state. The Eighth Circuit, however, specifically noted that "Dassault Aviation's nexus with Arkansas and the Little Rock completion center goes *well beyond* mere ownership of [a subsidiary's] stock." (Emphasis added) *Anderson*, *supra*, at 454. The panel below appropriately noted that "*Dassault Aviation's* establishment of a distribution system in Arkansas, and marketing its products there," (Emphasis added), as well as Petitioner's other activities targeted at the forum are matters that the court appropriately considered in its "minimum contacts" analysis. The panel below noted that Dassault itself "touts . . . that its 'presence' in the United States has been especially significant in the State of Arkansas." *Id.*, at 453. It should come to no surprise to either Petitioner or this Court that the former might be called upon to defend its product in Arkansas.

Contrary to Petitioner's implication, the Eighth Circuit found it unnecessary to even consider whether or not the subsidiary was in fact Petitioner's "alter ego," because, Petitioner, through its own purposeful availment of the market and benefits of the State of Arkansas, was found to

be more than "sufficient . . . to support an Arkansas court's assertion of personal jurisdiction." *Id.*, at 452-53. The panel below noted that:

> The majority of jets sold worldwide by Dassault Aviation fly in and out of Arkansas to be completed to the specifications of customers at the Dassault Aviation Group's largest production site by Dassault Aviation's wholly owned subsidiary and exclusive distributor of business jets in the western hemisphere.

Id., at 453. Dassault Falcon Jet is more than a mere subsidiary of Dassault Aviation; it is the Petitioner's exclusive distributor — the main cog to Petitioner's established distribution system — for the majority of Petitioner's business jets sold worldwide. The major hub for those activities is Arkansas. The panel below found that Dassault's activities have been specifically targeted and substantial in the forum to the extent that Petitioner has even acknowledged and touted its "presence" in the state:

> Dassault Aviation states in its 2001 annual report that '*Dassault Aviation* has been present particularly in the U.S. since the start of the 1970's through its specialized Falcon subsidiary — Dassault Falcon Jet — which has three offices in Tereboro (New Jersey), Little Rock (Arkansas) and Wilmington (Delaware) The Group's largest production site is in Little Rock.' (Emphasis Added) Thus, Dassault Aviation touts in its own annual report that its 'presence' in the United States [its single largest market] has been especially significant in the state of Arkansas.

(Emphasis by the court). *Id.*, at 453. Petitioner acknowledged that its established distribution system, involving its wholly owned subsidiary, was a consolidated effort, which included making "[q]uality Little Rock [Arkansas] completions . . .

standard for Falcon customers in both hemispheres." *Id.*, at 454.

> Because the two companies have a closely intertwined business relationship, Dassault Aviation's nexus with Arkansas and the Little Rock completion center goes well beyond mere ownership of Dassault Falcon stock. *This is not a situation in which Dassault Aviation simply placed the jet at issue 'into the stream of commerce' which fortuitously swept it into Arkansas.*

(Emphasis Added). *Id.*, at 454. Beyond Petitioner's substantial involvement in the establishment of the distribution system and activities of its exclusive distributor, the Eighth Circuit laid out Petitioner's other substantial activities carried out singularly and in concert with its wholly owned subsidiary in sustaining its business and presence in the United States and Arkansas. *Id.*, 453-55.

If anything, the Eighth Circuit's holding is predictable and foreseen, given these *admissions* on the part of Dassault that it has been present in the United States since the 1970's, particularly in Arkansas. It is bewildering that Dassault would first boast its own presence in Arkansas, and then turn around and contend that it has insufficient "minimum contacts" within the meaning of due process to be forced to defend its product in a court of law there. The Eighth Circuit's ruling below certainly does not run afoul of the holdings in jurisdictional cases that emphasize the importance of maintaining "traditional notions of fair play and substantial justice."

2. This Court's Decisions in *Asahi*, Which Featured Prominently in the Arguments Below, Support Arkansas' Exercise of Jurisdiction over Petitioner.

Not surprisingly, because the present action involves a product liability claim, this Court's opinion in *Asahi*, *supra*, played a significant part in the parties' analysis of Petitioner's activities which were directed toward Arkansas. Although the Justices in *Asahi* ultimately agreed in that case that an assertion of jurisdiction over the third party defendant, Asahi, would "offend traditional notions of fair play and substantial justice," *Id.*, 480 U.S. at 113,[1] the Court adopted essentially two differing opinions in applying the stream-of-commerce test *in the case of foreign component supplier* to determine whether the defendant purposefully availed itself of the privilege of acting in the forum state.

In analyzing the "minimum contacts" component of *in personam* jurisdiction, Justice Brennan, joined by Justices White, Marshall, and Blackmun, argued that there was no need to show "additional conduct" beyond the defendant's intent to place its product into the stream-of-commerce. Justice Brennan stated: "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come

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1. The Court noted,

> [i]n the present case . . . the interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, over Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan . . . The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards.

Id., 480 U.S. at 114.

as a surprise." *Id.*, at 480 U.S. at 117. Justice Brennan noted that a majority of the circuits agree with this view. *Id.*

> A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

Id.

Three other members, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, in analyzing the "minimum contacts" requirement, stated that "a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State," and the "mere placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state."[2] Justice O'Connor further noted that "additional conduct" would be

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2. Justice Stevens, while declining to analyze the stream-of-commerce argument, did state that whether placing an article into the stream-of-commerce amounts to minimum contacts "requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components." *Id.*, 480 U.S. at 127. When considered in light of the billions of dollars worth of jets that have been regularly flown in and out of Arkansas and sold to United States and Arkansas companies and residents, it is clear that Justice Stevens' analysis would likewise mandate the exercise of personal jurisdiction.

indicia of an "intent or purpose" on the part of the defendant manufacturer:

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or *marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.* But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

(Emphasis Added) *Id.*, 480 U.S. at 112.

As noted, the majority of states and circuits, including the Eighth Circuit, have chosen to adopt the more expansive approach reflected in Justice Brennan's opinion regarding the extent to which "other factors" come into play under a stream-of-commerce theory. *Asahi*, 480 U.S. at 117. Nevertheless, the analysis and holding of the panel below withstands scrutiny even under the more strenuous test posed by Justice O'Connor.

The Eighth Circuit below found that the evidence established that the Petitioner's activities were purposefully directed toward the forum state. *Anderson*, at 454. "We conclude that Dassault Aviation 'purposefully directed its products to the United States,' *and specifically to Arkansas*, where most Falcon jets are completed, 'through the distribution system it set up in this country.'" (Emphasis Added) *Id.* Petitioner "clearly intended to reap the benefits" of its wholly owned exclusive distributor's substantial presence in Arkansas, "[g]iven the central importance of the

Little Rock completion center to the success of Dassault Aviation's worldwide sales of business jets, and Arkansas' specific and identifiable role in Dassault Aviation's unified marketing endeavors with Dassault Falcon Jet[.]" *Id.*, at 454-55.

3. The Eighth Circuit Acknowledged that Ownership, By Itself, of a Subsidiary is Not Enough to Establish Jurisdiction Over the Parent; the Panel Adopted this court's "Minimum Contacts" Analysis.

Petitioner intimates that the Eighth Circuit's holding below allows for Dassault's mere ownership of DFJ to serve as a sufficient basis for jurisdiction. This representation is completely erroneous. The Eighth Circuit followed the most conservative perspective regarding the effect that *International Shoe* and its progeny have had on this Court's holding in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). *Cannon* stood for the proposition that ownership of a subsidiary, without more, is insufficient to establish jurisdiction.[3] The Eighth Circuit has agreed with this principle, finding that Dassault's relationship with its agent in America "goes well beyond mere ownership of Dassault Falcon jet stock." *Anderson*, 361 F.3d at 454.

Petitioner suggests that the Eighth Circuit has somehow disavowed or ignored the core holding of *Cannon*. This subliminal undertaking is evident through Petitioner's citation of cases which hold that the mere ownership, *per se*, of a subsidiary does not subject the parent to *in personam*

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3. *Cannon*'s breadth at that time confined itself to situations where the subsidiary was *not* the agent of the parent. *Curtis Publishing Company v. Cassel*, 302 F.2d 132, 137 (10th Cir. Kan. 1962) ("At the very least there is strong implication in the *Cannon* decision that a corporation may be present [in the forum state] *through an agent.*") (Emphasis Added)

jurisdiction in the state where the subsidiary does business. *See, e.g., I.A.M. National Pension Fund v. Wakefield Industries, Inc.*, 699 F.2d 1254, 1258-59 (D.C. Cir. 1983) ("the relationship of parent and subsidiary *alone* would not suffice" for "service on the parent to reach a foreign subsidiary") (emphasis added); *Gray v. Riso Kagaku Corp.*, 1996 WL 181488, at 3 (4th Cir. Apr. 17, 1996) ("*mere* fact that Riso Kagaku's subsidiaries do business in South Carolina does not confer personal jurisdiction over Riso Kagaku") (emphasis added). Petitioner's reliance upon *Cannon* is misplaced because the Eighth Circuit's holding acknowledges, agrees with, and in no way deviates from, the "mere ownership" maxim.[4]

4. *International Shoe*: Due Process Allows for Establishing Jurisdiction Over a Foreign Defendant that is Not Physically Present in the Forum State.

International Shoe held that due process only requires that a defendant not present within the territory of the forum need only have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.*, 326 U.S. at 316, *quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940). *International Shoe* held that a

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4. *Cannon*, which pre-dated this Court's decision in *International Shoe* by twenty years, dealt with a contract transaction executed in Maine. Justice Brandeis intended to explore the parent-subsidiary relationship in common law terms rather than constitutional terms. It is questionable whether *Cannon* has any constitutional relevance today, given the changes in the jurisprudential landscape brought by *International Shoe* and its progeny. *See* Lea Brilmayer and Kathleen Paiseley, "Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency," 74 Cal. L. Rev. 1, 3-4 (1986), *citing* P. Blumberg, *The Law of Corporate Groups*, 43-47 (1983).

foreign corporation which had "minimum contacts" in the forum state could be "present" for purposes of *in personam* jurisdiction.

> [A] wholly owned subsidiary may be an agent and when its activities as an agent are of such character as to amount to doing business of the parent, the parent is subjected to the *in personam* jurisdiction of the state in which the activities occurred. While *International Shoe* does not repudiate the "presence" doctrine it, at the very least, permits presence to be inferred from "minimum contacts."

Curtis Publishing, *supra*, at 137.

This Court has never held that a corporate defendant can avoid personal jurisdiction simply by dispatching its agents to the forum state to conduct the former's business. Such a myopic rule would ignore the realities of today's globalized market and methods of distribution. Since at least 1945 (with *International Shoe*), it has been well established that physical presence within the forum state is *not* a prerequisite to the exercise of personal jurisdiction. *See International Shoe*, at 316.

This Court need look no further than the text of *International Shoe* for support of the exercise of *in personam* jurisdiction over the Petitioner in the State of Arkansas. *International Shoe* stated that a corporate defendant's "presence" within the forum state can only be manifested, as a practical matter, by activities carried on its behalf by those who are authorized to act for it. *Id.*, 326 U.S. at 316. The terms "present" or "presence" are used merely to symbolize those activities of the corporation's *agent* within the state. This kind of "presence" is sufficient for purposes of due process. *Id.*, 326 U.S. at 317.

Overall, *International Shoe* purposefully kept its language flexible and its sweep broad. This malleability is exemplified by Chief Justice Stone's statement that satisfying due process in these cases would be dependent upon the "quality and nature of the corporation's activity in relation

to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.*, 326 U.S. at 319. In addition to its own activities, Dassault relied extensively upon its American *agent* to complete, distribute, and market Falcon jets in the United States, and specifically Arkansas, thereby rendering the Petitioner amenable to suit in Arkansas within the broad meaning of *International Shoe* itself.

5. The Eighth Circuit Appropriately Recognized that the Relationship Between Dassault Aviation and Dassault Falcon Jet Goes Well Beyond a Parent's Mere Ownership of a Subsidiary.

The Eighth Circuit acknowledged that the *mere* ownership of a subsidiary does not subject the parent to *in personam* jurisdiction in the state where the subsidiary does business. *Epps v. Stewart Information Services, Inc.*, 327 F.3d 642 (8th Cir. 2003). Distinguishing the facts in *Epps*, however, the Eighth Circuit below correctly held that "Dassault Aviation's contacts with Arkansas go well beyond mere ownership of Dassault Falcon Jet." *Anderson, supra*, 361 F.3d at 452.

Petitioner's subsidiary is part of a distribution system in Arkansas established by Petitioner for the purpose of completing, distributing and marketing its products there. Arkansas is the major hub for the Dassault Group's business operations in the United States. The Eighth Circuit below noted that:

> The majority of jets sold worldwide by Dassault Aviation fly in and out of Arkansas to be completed to the specifications of customers at the Dassault Aviation Group's largest production site by Dassault Aviation's wholly owned subsidiary and exclusive distributor of business jets in the western hemisphere.

Anderson, 361 F.3d at 453. Dassault Aviation has established

a plan of distribution, including distributorship agreements with its subsidiary, in which, *inter alia*:

- The subsidiary is appointed "the exclusive distributor for the sale and lease of all Falcon model aircraft" in Petitioner's single-largest market, the United States.
- With regard to specified sales, Dassault Aviation requires that the exclusive distributor "coordinate all of its sales efforts with Dassault Aviation and inform Dassault Aviation of all follow-up of its negotiations."
- Dassault Aviation has agreed to support the distributor's sales efforts in providing appropriate technical data and performance information.
- Dassault Aviation requires Dassault Falcon Jet to "pursue diligently and with its best efforts the sale and lease of Falcon Aircraft."
- Dassault Aviation requires its subsidiary to advise the former of "the identity of its prospective agents, sales representatives and/or dealers prior to their appointment."

The only way a customer in Dassault Aviation's single largest market in the world can acquire any of Dassault Aviation's Falcon jets is through the company's exclusive United States distributor, DFJ. The marketing, service and sales efforts of DFJ are clearly designed to — and do — substantially generate revenue for its parent, Dassault Aviation. In the last decade as much as 81% of the revenues of Dassault's civil aircraft division in any fiscal year were attributable to the activities of DFJ. Dassault Aviation created and owns its exclusive distributor in the United States. DFJ was established as Dassault Aviation's wholly owned subsidiary after Dassault Aviation had first formed a "joint venture" with its former United States distributor and then

later bought out the non-affiliated partner. Dassault Aviation has furnished the CEO and the President, two chief operating and executive officers, of DFJ. Dassault Aviation has agreed to provide sales and service support for its U.S. distributor.

Dassault's agent does *not* manufacture a product independent of the parent; rather, it works with Dassault to market and distribute the Dassault Falcon Jets pursuant to the established plan of distribution. It also completes the manufacture of these business jets according to the specifications of Petitioner and the customers and provides after-sale service in Arkansas. It is a process that, but for the existence of its American agent, would out of necessity be the responsibility of Dassault itself.[5] Dassault, in its plan of distribution, utilizes and relies upon its agent and subsidiary extensively to maintain a competitive edge in the United States. The "close, synergistic" or "symbiotic" relationship between Dassault and its agent is true and obvious, which is why the Eighth Circuit chose to use those words in describing it.

6. "More Recent Doctrinal Refinements" Support the Eighth Circuit's Finding of *In Personam* Jurisdiction over Dassault.

Notwithstanding Petitioner's making much ado over the false assertion that "more recent doctrinal refinements" to *International Shoe* are unreflected in the Eighth Circuit,[6] the

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5. When a company acts through a subsidiary as its agent in the forum state to do what it otherwise would have done itself, it clearly has purposely availed itself of the privilege of doing business in the forum. *Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079, 1083 (E.D. Pa. 1992). No better example exists to support this realization than the "close, synergistic" and "symbiotic" relationship between Dassault and its American agent.

6. Petitioner cites a law review article, 34 Seton Hall L. Rev. 807, by Charles Rhodes, as support for the notion that Judge Blackmun's analysis "fails to reflect this Court's more recent doctrinal refinements." (Petition, page 22, footnote 5)

decision of the panel below is completely congruent with this Court's opinions in *Burger King*, *World-Wide Volkswagen*, and *Asahi*, *supra*. Petitioner's reference to "more recent doctrinal refinements" is misleading because decisions which followed *International Shoe* have been universal in extolling the flexibility and permissiveness of the "minimum contacts" doctrine, given the evolution of communication and transportation in our modern society. *See*, *e.g.*, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199 (1957) ("[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.")

In later years, this Court would adopt additional terms that have become a part of the analytical framework. As stated above, *International Shoe* itself held that a nonresident defendant need not be physically present in the forum state in order to be subjected to jurisdiction there. *Id.*, at 316. This premise has been refined in recent years by the "purposeful availment" requirement provided by *Burger King*. A defendant who has purposefully directed his activities to the forum state has "fair warning" that his actions would render him amenable to suit in the forum state for injuries that relate to his contact there. *Burger King*, 471 U.S. at 472-75. "Contacts" are not limited to those acts which are physically performed within the forum state, but include acts that are performed outside the forum state, which would have an *effect* on the forum state. Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 88-96 (1980). Overall, the *in personam* jurisdictional limits imposed on the states by the due process clause, "in its role as guarantor against inconvenient litigation, have been substantially relaxed over the years." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 564-65 (1980).

Lastly, this Court's opinion in *Burger King* made it clear that the "substantial connection" between the defendant and

the forum state necessary for a finding of minimum contacts may come about by an action of the defendant purposefully directed toward the forum state. *Id.*, 471 U.S. at 476. If establishing minimum contacts through "purposeful availment" is characterized as a "recent doctrinal refinement" to *International Shoe*, then it is certainly a refinement that operates to the advantage of plaintiffs.

B. Contrary to the Petitioner's Claim, the Eighth Circuit Did *Not* Rely Upon a "Multi-Factor" Balancing Test, or Any other "Test," Aside from What is Required by *International Shoe*.

After establishing the "substantial nexus" that Petitioner had with the State of Arkansas, the Eighth Circuit only then looked to "other considerations," which "*also* support the exercise of personal jurisdiction." (Emphasis Added) *Anderson*, *supra*, at 455. As noted above, the Eighth Circuit first found that Petitioner had "minimum contacts" with the State of Arkansas, and that Petitioner's activities were such that "it would not violate traditional notions of fair play and substantial justice for an Arkansas court to assert personal jurisdiction in this action." *Id.* The Eighth Circuit below found that the Petitioner's contact with the State of Arkansas results, "in large part, from its business relationship" with its American agent, with operates a large production site in Little Rock that completes Falcon jets to customers' specifications. *Id.*, 361 F.3d at 452.

Additionally, the Eighth Circuit found that the relationship between Dassault and its American agent is symbiotic and closely synergistic, which it clearly is. At every available turn in its Petition, Dassault has derisively placed those words in quotations, all in a misleading attempt to intimate that the Eighth Circuit has developed a new test called the "close, symbiotic relationship" test.[7] A closer

7. Dassault cites this Court to *Enterprise Rent-A-Car Co. v. U-Haul Int'l, Inc.*, 327 F. Supp. 2d 1032 (E.D. Mo. July 22, 2004), (Cont'd)

examination of the decision below reflects that no such "test" was adopted by the Eighth Circuit. Rather, the Eighth Circuit found that the relationship between Dassault and its agent was, indeed, "synergistic," and "closely symbiotic," which says more about the Eighth Circuit's descriptive word choice than about any "test" that it applied. Judge Arnold's well-scripted opinion below speaks for itself in establishing the "minimum contacts" standard enunciated in *International Shoe* and made even more fungible by this Court's "more recent doctrinal refinements." The "close, symbiotic relationship test" is a misleading and fantastical invention of the Petitioner.

In addition to the closeness of Dassault to its agent in America, the Eighth Circuit placed considerable emphasis on the economic benefit that Dassault has achieved from its Group's Little Rock facility:

> Dassault Aviation itself has paid over $126 million to Dassault Falcon Jet in the seven years preceding the filing of this action for completions done in Little Rock to Falcon jets that Dassault Aviation then sold to other parties.

Id., 361 F.3d at 453. The Eighth Circuit relied upon information posted on the website (*www.dassaultfalcon.com*) that Petitioner operates and administers jointly with its American agent:

> The companies indicate their pride in the Arkansas facility and its importance to their success by

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(Cont'd)
for the erroneous proposition that a novel "symbiotic relationship test" now exists in the Eighth Circuit. While the district court in *Enterprise* have found that the relationship between a parent and subsidiary to be "symbiotic," the district court never applied a "symbiotic relationship" test, preferring instead to apply the same traditional "minimum contacts" analysis that the Eighth Circuit in this case followed. *Id.*, 1036-37.

> noting on their website that the Little Rock completion center is "one of the best-equipped and most efficient facilities anywhere — the envy of the completion industry — another testament to the Dassault Falcon passion."

Id. The Eighth Circuit pointed out (most likely to avoid any more confusion than may already have been caused by Dassault's persistent blurring of its image and logo with that of its agent) that "Dassault Falcon" in the context of the statement above does not refer to DFJ. Rather, "Dassault Falcon" refers by name to the division of *Dassault Aviation* that specializes in Falcon business jets. *Id.*, 361 F.3d at 453-54.

The Eighth Circuit also appreciated that Dassault Aviation participates in publishing a "Falcon Operator Directory" that gives a listing of seventeen Dassault jets owned and operated by persons or companies in Arkansas. This directory also gives the name of a "field service representative" in Little Rock who provides services and information to Falcon operators in Arkansas. The directory likewise provides an "authorized service center" for Falcon jets in Little Rock and a designated salesperson for potential Arkansas customers. *Id.*, 361 F.3d at 454. The directory specifically deals with the business jets, such as the Dassault Falcon 900B *sub judice*, sold by the Petitioner, Dassault.

The vast majority of all Dassault's business jets sold worldwide are completed in Little Rock, Arkansas, including the Dassault Falcon 900B in which Respondent was injured. Dassault purposefully availed itself of the privilege of doing business in the forum state through its business relationship with its agent and exclusive distributor, who happens to also be its wholly-owned subsidiary. Especially, inasmuch as Dassault has admitted that it has been present in the United States since the 1970s, particularly in Arkansas, the Eighth Circuit properly (and to no surprise) found that Dassault had

purposely availed itself to the forum state and, therefore, had "minimum contacts" with the State of Arkansas. It defies common sense and credulity to suggest that Dassault would be surprised that it would be expected to defend one of its products in an Arkansas courtroom, or that it cannot be fairly haled into an Arkansas courtroom, or that jurisdiction in Arkansas over Dassault would "offend traditional notions of fair play and substantial justice."

1. The Eighth Circuit Did Not Adopt a Multi-Factor Test; Its Decision is Consistent with *Burger King* and Considered "Other Factors" After Minimum Contacts Had Already Been Established.

In an obvious attempt to once again create a conflict where none exists, Petitioner cites to *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965), for the proposition that the Eighth Circuit in the present case adopted a "multi-factor balancing test" that is inconsistent with "more recent doctrinal refinements" enunciated by this Court. A simple reading of the Eighth Circuit's opinion demonstrates that the panel did not rely upon, or even cite, *Aftanase*.[8] Rather, consistent with this Court's "more recent doctrinal refinements," the panel looked to other considerations "once it [had] been decided that [the defendant] purposefully established minimum contacts with the forum State." *Burger King*, 471 U.S. at 476, cited at Petitioner's Brief, pg. 17.

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8. Although the Eighth Circuit in this case did not cite *Aftanase*, Judge Blackmun pointed out that:

> the boundary line [in this analysis] 'cannot be simply mechanical or quantitative.' Rather, 'it is the quality and nature of the activity in relation to the fair and orderly administration of the laws.' Activity gives rise to obligations and, to the extent these are connected with activity within the state, responsiveness is not undue.

Id., 343 F.2d at 195-96 (internal citations omitted).

These "other factors" are discerned clearly in the texts of U.S. Supreme Court opinions of *McGee*, *supra*, 355 U.S. at 223, 78 S. Ct. at 201; *Kulko California Superior Court*, 436 U.S. 84, 92, 98 S. Ct. 1690, 1697 (1978); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 564-65 (1980); and *Burger King*. Consideration of these factors conforms with the analytical framework endorsed and promulgated by this Court, are completely derivative of this Court's holding in *International Shoe*, and are in no wise inconsistent with the body of cases that have flourished in the decades that have followed.

These considerations are consistent with, and draw heavily from, this Court's precedent cases. A closer examination of *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S. Ct. 1868 (1984), as well as *Burger King*, *supra*, *World-Wide Volkswagen*, *supra*, and *Asahi*, *supra*, bolsters the validity of this claim, because these "other considerations" emanate from U.S. Supreme Court opinions that followed *International Shoe*.

2. The Present Case "Arises out of, or is Related to," the Petitioner's Forum State Activity; In Any Event, Petitioner Has Had "Continuous and Systematic Contact" with Arkansas Since the 1970s.

The present case involves an action that arises out of and/or is related to Petitioner's contacts with the State of Arkansas; therefore, this case would constitute a case of "specific jurisdiction."[9] All of Dassault Aviation and its

9. This Court in *Helicopteros* noted that all parties had stipulated that the plaintiffs' cause of action against the Colombian corporation did not "arise out of" and was not "related to" that corporation's contacts with the State of Texas. Notwithstanding the parties' stipulations, Justice Brennan, dissenting, found that the "undisputed contacts" that existed in the case between Helicol and the State of Texas were "sufficiently important, and sufficiently *related* to the underlying cause of action," to warrant the exercise of that state's in (Cont'd)

subsidiary's activities relate directly to the sale and distribution of Falcon jets throughout the United States, including jets that are sold, owned and operated in Arkansas. The jet that is the subject of the present action, like the majority of all Falcon jets manufactured by Dassault Aviation, was "completed" at the Dassault Falcon Jet facility in Little Rock, Arkansas. The subject Dassault Falcon 900 was also delivered in a defective state to its customer *in Little Rock, Arkansas*.

Petitioner's attempt to convince this Court that a product liability action cannot "relate to" or "arise out" of its activities with the State of Arkansas, simply because the accident itself did not occur there, ignores the realities of modern commerce and tort law. An accident, by definition is an unplanned event, which relates very little, if at all, to a reasonable expectation of what forum has a greater interest in, or relation to, the subject litigation. *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 738 (8th Cir.), *cert. denied,* 516 U.S. 814, 116 S.Ct. 67, 133 L.Ed.2d 28 (1995). Rather, the most significant aspects of a product liability action as they relate to a defendant are most concerned with the defendant's activities *before* the accident or injury producing event, including the marketing and delivery of the product at issue.

Arkansas has a significant interest in seeing that products that are being deliberately brought into the state, and sold to and/or transporting its residents, are safe. *Dassault*, at 455 ("Furthermore, Arkansas has a substantial interest in the matter to be litigated, as the safety of Falcon jets affects the state's consumers and workers who encounter Dassault Aviation's products."); *Clune v. Alimak AB*, 233 F.3d 538, 546 (8th Cir. Mo. 2001), *cert. denied*, 533 U.S. 929, 121 S. Ct. 2551 (2001). Even though the accident itself did not occur in the State of Arkansas, it is incontrovertible that the Dassault Falcon DA-900B business jet was manufactured by

(Cont'd)
personam jurisdiction over the foreign defendant. (Emphasis Added) *Helicopteros*, 466 U.S. at 420 (Brennan, J., dissenting)

the Petitioner in France, and then ferried to the Group's major facility in Little Rock, Arkansas, owned and operated by the Petitioner's exclusive distributor and wholly-owned subsidiary, where it was completed and sold to its customer. The delivery of this completed product to Amway took place in Arkansas. Respondent's products liability claim arises out of, and is related to, Petitioner's activities in the State of Arkansas. Therefore, this action is one clearly involving specific jurisdiction inasmuch as the alleged wrongful conduct committed by these defendants (*to wit*: delivering a defective product to a customer) occurred in the forum State.

In any event, the record demonstrates that Petitioner's activities directed at the State of Arkansas have also been "continuous and systematic," sufficient to justify even the exercise of "general jurisdiction." Indeed, "since the 1970's," Dassault's presence it Arkansas has been regular, continuous and systematic. Petitioner has in more recent years pursued a systematic consolidation and unification of identity with its subsidiary, which operates in Arkansas the single largest production facility for Dassault Falcon jets worldwide. The vast majority of Dassault business jets sold worldwide are flown in and out Arkansas to be completed. The Dassault Group's Little Rock facility also serves as a major service facility for the business jets after their manufacture. Hence, "general jurisdiction" is equally present.

3. This Court in *Burger King* Formally Endorses the Consideration of "Other Factors" Following a Finding of "Minimum Contacts."

In *Burger King*, a franchisor brought suit in a Florida court against a Michigan franchisee. The franchisee contended that he was not subject to *in personam* jurisdiction in Florida because he was a Michigan resident and the plaintiff's claim did not "arise" within Florida. In holding that jurisdiction comported with due process, this Court, per Justice Brennan, cited *International Shoe*, *supra*, for the

proposition that once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of *other* factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *Id.*, 471 U.S. at 462. In answering what "other factors" may be in the context of a jurisdictional analysis, this Court added the following:

> Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial systems's interest in obtaining the most efficient resolution of controversies," and the shared interest of the several States in furthering fundamental substantive social policies." [*citing World-Wide Volkswagen, supra*] *These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.*

(Emphasis Added). *Burger King*, 471 U.S. at 462. *Burger King* unveils a strong endorsement of the considerations that the Petitioner erroneously calls the "multi-factor test." Consideration of these factors accedes entirely with this Court's decision in *Burger King*.

Dassault purposefully directed its activities to the forum state. Dassault has relied upon its agent in the United States to provide distribution services which otherwise would have to be performed by Dassault itself in order to maintain a competitive edge in the American market. *Burger King* supports the exercise of personal jurisdiction over Dassault under these circumstances because the delivery of this unfinished business jet to the Dassault Group's completion and distribution center in Little Rock demonstrates a purpose on the part of Dassault to *target* the forum state for its own financial enrichment.

C. Challenges to Jurisdiction Based on Distributorship Agreements Have Been Rejected by this Court Inasmuch as Such Jurisdiction Derives from Language Explicitly Found in *International Shoe* and *Asahi*.

The distributorship agreement between Petitioner and its American agent featured prominently in the Eighth Circuit's finding that Arkansas could properly exercise *in personam* jurisdiction over Dassault Aviation. DFJ is Dassault's distribution plan for the Western Hemisphere, through which these business jets are marketed throughout the United States, including Arkansas. This arrangement is certainly more closely-held, and altogether less tenuous, than the relationship that existed in *Tobin v. Astra Pharmaceutical Prod., Inc.*, 993 F.2d 528, 543 (6th Cir. 1993), *cert. denied, sub nom. Duphar v. Tobin*, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993). In that case, the plaintiff filed a products liability suit against Duphar, the Dutch manufacturer of a drug called ritodrine, and against Astra Pharmaceutical, Duphar's United States distributor. Plaintiff's claim against Duphar was dismissed for lack of *in personam* jurisdiction. The Sixth Circuit reversed, holding that Duphar had purposefully availed itself of the United States market by virtue of its distributorship agreement with Astra. *Id.*, 993 F.2d at 544. The court noted that "Duphar did not merely sell its product on the market with no direction in mind." *Id.*

Duphar petitioned this Court for a writ of certiorari, which was denied. *Id.*, 510 U.S. 914, 114 S. Ct. 304 (1993). In opposition to the petition for a writ of certiorari, the respondent in that case made the following argument:

> Duphar did not simply place its product in a stream of commerce which haphazardly swept it to the forum. Duphar formally entered into an elaborate licensing agreement with Astra providing that Astra would distribute ritodrine in "the United

> States of America, its territories and possessions, and Puerto Rico. *Such an agreement would have been no different if it had listed each of the fifty states by name: it is a deliberate decision to market in the forum state.*

(Emphasis Added). *Duphar v. Tobin*, Respondent's Brief in Opposition, 1993 WL 13076322 (1993). The plan of distribution in the instant case is substantially more targeted at the forum state than was true in *Duphar*. In addition to the fact that the Dassault-DFJ relationship is even more closely-knit than that of Duphar and Astra, Petitioner's plan of distribution has specifically targeted Little Rock, Arkansas, as the Group's hub for the completion and distribution of Falcon jets worldwide. ("Little Rock is now the main completion center for all Falcon jets worldwide." *Anderson*, at 453.)

Numerous courts inside and outside the Eighth Circuit have agreed that a manufacturer who distributes its product through a national or regional distributor establishes minimum contacts with the states in which the distributor operates. *See, e.g., Tobin, supra*; *Clune, supra*[10]; *Warren v. Honda Motor Co.*, 669 F. Supp. 365, 370 (D. Utah 1987); *Wessinger v. Vetter Corp.*, 685 F. Supp. 769, 777 (D. Kan. 1987); *Hall v. Zambelli*, 669 F. Supp. 753, 757 (S.D. W. Va. 1987); *Burton v. Subaru of America*, 646 F. Supp. 78 (N.D. Ga. 1986); *Waters v. Deutz Corp.*, Del. Super., 460

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10. The *Clune* opinion that featured prominently below was also denied for review by this Court. In that case, a Swedish manufacturer's products were sold in the United States through two distributors. Like Dassault in the present action, the defendant maintained that had no direct contacts with the forum state, but relied upon its exclusive distributor. The Eighth Circuit found that the defendant had done more than merely placing a product in the stream of commerce. "The record shows [that the defendant] created the distribution system that brought the [product] to [the forum state.]" *Clune*, 233 F.3d at 543.

A.2d 1332, 1337-38 (1983). Dassault Aviation purposefully directed its activities to the state of Arkansas and established contacts in the state of Arkansas through its American agent. It cannot be said that Dassault merely placed a business jet into the stream of commerce that somehow, fortuitously found its way to Arkansas. The Eighth Circuit below found this to be evident. *Anderson*, *supra*, 361 F.3d at 454. Additionally compelling is the truism that this jet did not become a completed product until it had already arrived at the Dassault Group's facility in Little Rock.

This Court correctly denied the petitions for writs of certiorari in *Tobin* and in *Clune*, as it should likewise do in the instant case. The Sixth Circuit in *Tobin* relied upon this Court's plurality opinion in *Asahi*, *supra*, for the proposition that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum state" can "indicate a purpose to serve the market in the forum state." *Tobin*, *supra*, 993 F.2d at 544. The Eighth Circuit in *Clune* relied upon this Court's opinion in *Burger King* for the proposition that the "baseline for minimum contacts is 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Clune*, *supra*, 223 F.3d at 542.

It has been incontrovertible throughout the proceedings below that Dassault Aviation has designated DFJ to be its "exclusive distributor" for Falcon aircraft in the United States. Dassault's agent has actively solicited (and acquired) billions of dollars worth of business with customers in the United States, including Arkansas. All of these activities have been undertaken with the direction, knowledge, and consent of Dassault. The United States is by far the single largest market for Dassault's business jets, and the Little Rock completion center is the largest facility in the Dassault Group. Clearly an average of almost three-quarters of Dassault Aviation's business jet sales are attributed to its agent in the

United States. Finally, the vast majority of all Dassault's business jets sold worldwide are completed at the Group's facility in Little Rock, Arkansas, including the Dassault Falcon 900B *sub judice*. Any notion that Dassault cannot be fairly haled into an Arkansas courtroom does considerable violence to this Court's holdings in *International Shoe*, *Burger King*, *World-Wide Volkswagen*, *Asahi*, and other cases. The Eighth Circuit's decision below relied upon, and is supported by, settled law, thereby justifying denial of the Petition.

CONCLUSION

For the foregoing reasons, this Petition should be denied.

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In the Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

1. *The Conflict Over The Proper Rule Of Attribution* ... 2

2. *The Conflict Over The* International Shoe *Test* 5

3. *Respondent's Arguments On The Merits* 6

   a. *The Newly Minted "Agency" Theory* 7

   b. *The "Stream Of Commerce" Theory* 7

   c. *The Specific Jurisdiction Theory* 8

   d. *The General Jurisdiction Theory* 10

4. *The Compelling Need For This Court's Guidance* .. 10

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Aftanase v. *Economy Baler Co.*,
343 F.2d 187 (8th Cir. 1965) 6

Cannon Mfg. Co. v. *Cudahy Packing Co.*,
267 U.S. 333 (1925) 2, 3

Carnival Cruise Lines, Inc. v. *Shute*,
499 U.S. 585 (1991) 9

Central States, S.E. & S.W. Areas Pension Fund v.
Reimer Express World Corp., 230 F.3d 934
(7th Cir. 2000), cert. denied, 532 U.S. 943 (2001) 4

Chew v. *Dietrich*, 143 F.3d 24 (2d Cir.), cert. denied,
525 U.S. 948 (1998) 9

Hargrave v. *Fibreboard Corp.*,
710 F.2d 1154 (5th Cir. 1983) 3

Helicopteros Nacionales de Colombia, S.A. v.
Hall, 466 U.S. 408 (1984) 9

International Shoe Co. v. *Washington*,
326 U.S. 310 (1945) 3, 4, 6

United States v. *Bestfoods*, 524 U.S. 51 (1998) 4

World-Wide Volkswagen Corp. v. *Woodson*,
444 U.S. 286 (1980) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous:

Br. for Petitioner, *Carnival Cruise Lines* v. *Shute*, No. 89-1647 10

Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) 10

PERRY, DECIDING TO DECIDE (1991) 10

Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807 (2004) 6

REPLY BRIEF FOR PETITIONER

Respondent's brief is most notable for what it does not say. It does not seriously dispute any of the following key points:

- The Eighth Circuit squarely rejected a "veil-piercing" rule for attributing a subsidiary's activities to its parent company for purposes of determining minimum contacts (Pet. 6, 12; Pet. App. 4a-5a).
- The Eighth Circuit's rejection of this rule creates a clear conflict with those courts applying it, including other circuits, state supreme courts, the district court in this case, and the Western District of Michigan in a related case (Pet. 3, 5, 13-15).
- Under this Court's cases, and the decisions of other circuits, a court must separately examine whether "specific" and "general" jurisdiction exist, as well as give substantial weight to the burdens imposed on non-U.S. corporations – but the Eighth Circuit did neither (Pet. 6, 8, 18-19, 21).
- The multi-factor balancing "test" used by the Eighth Circuit is inconsistent with the approach used in the Fourth, Sixth, Seventh, and Ninth Circuits, and in certain state supreme courts, although consistent with the approach used by other courts (Pet. 18-19, 22).
- Each of the two constitutional issues raised by this case is recurring and vitally important (Pet. 23-24).

Although respondent does repeatedly *assert* that some of the serious conflicts documented in the petition (and confirmed by numerous judges and commentators) are nonexistent (Opp. 1, 10, 16, 20), her limited efforts to back up those assertions are wholly unpersuasive.

Equally unavailing are respondent's attempts to justify the result below on several grounds that the Eighth Circuit *itself* declined to invoke – either because they are meritless or (as in the case of respondent's repeated assertion that Falcon Jet was

Dassaut's "agent") because they were never raised below and lack any support in the record. For the reasons set forth below and in the petition, review by this Court is warranted.

1. *The Conflict Over The Proper Rule Of Attribution.* The court below held that *Falcon Jet*'s contacts with Arkansas provide a basis for asserting personal jurisdiction over *Dassault*, even though the two corporations are separate and have "nothing more than a typical" parent-subsidiary relationship. Pet. App. 15a. Prior to the decision below, there was already a clear conflict between three lines of cases: (1) this Court's decision in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), and the lower court decisions that have applied the stringent *Cannon* standard in determining attribution issues; (2) the decsions of other courts applying an "alter ego" test to attributon issues; and (3) the decisions of still other courts in allowing attribution even where the *Cannon* and "alter ego" tests would forbid it. Pet. 12-17. The Eighth Circuit's holding that attribution is appropriate where there is a "synergistic" or "symbiotic" relationship between corporate affiliates (Pet. App. 5a, 9a) adds to this irreconcilable conflict in the lower courts.

In response, respondent first claims that the Eighth Circuit never actually ruled on the attribution issue. Opp. 4 ("the Eighth Circuit found it unnecessary to even consider whether or not the subsidiary was in fact Petitioner's 'alter ego'"). That assertion is easily refuted. The Eighth Circuit acknowledged that the relationship between Dassault and Falcon Jet "is not an abuse of the corporate organizational form," but expressly "agree[d] with" respondent that "piercing * * * Falcon Jet's corporate veil" was not "required" before Falcon Jet's contacts could be imputed to Dassault. Pet. App. 5a; see also *id.* at 4a-5a (rejecting the district court's "alter ego" rule).

Next, respondent attempts to minimize the conflicts by arguing that *Cannon*, and other selected lower court cases we have cited, stand only for the proposition that "mere ownership" of a subsidiary is an insufficient basis for exercising jurisdiction over the parent company. Opp. 10-11, 13. That argument is

also wide of the mark. It confuses the issue of *overall sufficiency* of a defendant's forum contacts with *the legal test for attribution*. *Cannon* and some of its progeny do not simply hold that "mere ownership" is an insufficient basis for exercising personal jurisdiction; they *also* set forth a rule of attribution that determines *when* the contacts of a subsidiary *may not be imputed* to its shareholder (the parent). See Pet. 13; *Cannon*, 267 U.S. at 337-38; *Hargrave* v. *Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (*Cannon* "stands for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state *may not be attributed* to the other") (emphasis added).

The Eighth Circuit's decision in this case is inconsistent with *Cannon*'s rule of attribution. Respondent falls back on the argument that "[i]t is questionable" whether *Cannon* remains good law. Opp. 11 n.4. But, as we explained in the petition (at 13-14), the confusion in the lower courts over *Cannon*'s status after *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), provides an *additional* reason why this Court's guidance is needed. In any event, there is no denying the conflict between the Eighth Circuit's decision and the "alter ego" approach it expressly rejected.[1]

Because of the national importance of the attribution issue, two of the largest business organizations in this country have filed an *amicus* brief urging this Court to grant review. As

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[1] Respondent suggests (Opp. 4, 10) that the entire petition rests on the "false[] premise that the Eighth Circuit concluded that jurisdiction was present merely upon the basis of Dassault's ownership of a subsidiary that is present and active in the forum state." Although the premise is not false – the Eighth Circuit *did* rely almost exclusively on Falcon Jet's contacts in upholding jurisdiction over Dassault (see Pet. 7; Pet. App. 3a) – it would hardly moot the petition if the Eighth Circuit relied on other "contacts" of Dassault as well. Thus, if the Court were to grant review of only the first question presented, decide that the *Cannon* or "alter ego" approach to attribution is correct, and reverse the Eighth Circuit's contrary holding, it would be up to the Eighth Circuit on remand to determine whether any independent "contacts" of Dassault might satisfy the "minimum contacts" test.

amici correctly point out, the Eighth Circuit's holding "deliberately disregards * * * 'general principle[s] of corporate law deeply ingrained in our economic and legal systems.'" *Amicus* Br. 8 (quoting *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotations omitted)). The result of the Eighth Circuit's approach is to "strip[]" away "crucial protections and rights that are part and parcel of establishment under the corporate form" – an outcome that "will necessarily discourage investment in the U.S. market." *Ibid.* Notably, respondent does not even attempt to explain how the Eighth Circuit's attribution based on a "synergistic relationship" can be reconciled with *Bestfoods* – or with this Court's teaching (Pet. 24-25) that the requirements of due process hinge on traditional practices and principles, including the legal protections long embodied in the law of corporations.

Moreover, as *amici* point out (at 4), the decision below is squarely at odds with *Central States, S.E. & S.W. Areas Pension Fund* v. *Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000), cert. denied, 532 U.S. 943 (2001), which held that "constitutional due process requires that personal jurisdiction cannot be premised on corporate affiliation or stock ownership alone where corporate formalities are substantially observed and the parent does not exercise an unusually high degree of control over the subsidiary." Thus, "[w]here two corporations are in fact separate, permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent *violates* * * * *due process*." *Id.* at 944 (emphasis added). That rule, the Seventh Circuit explained, finds support in this Court's decisions and serves to protect the reasonable expectations of shareholders. *Id.* at 943-45; accord Pet. 25-26. Under *Central States*, the Eighth Circuit's "synergistic relationship" approach to attribution clearly "violates due process." Had this case been brought in the Seventh Circuit, it doubtless would have come out the other way.[2]

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[2] The Eighth Circuit's "synergistic relationship" test is especially troubling because it permits attribution based solely on "factors that are commonplace

2. *The Conflict Over The* International Shoe *Test.* Attempting to make a virtue of necessity, respondent applauds the "malleability" and "permissiveness" of the Eighth Circuit's approach to determining "minimum contacts" and "fair play and substantial justice." Opp. 12, 16. But that is precisely our point. The Eighth Circuit's vague, multi-factor balancing test makes it impossible for defendants to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Beyond that, as we showed in the petition (at 18-19, 22), the Eighth Circuit's approach to the *International Shoe* test ignores this Court's teachings and conflicts with the decisions of other courts.

Respondent insists that "the Eighth Circuit did *not* rely upon a 'multi-factor' balancing test" (Opp. 17 (emphasis in original)). By that she means that the panel "looked to other considerations" only "*after* it had found 'minimum contacts.'" Opp. i (emphasis added); accord *id.* at 17, 20. That argument ignores what the Eighth Circuit actually said – that it would "consider" the fair-play considerations "[i]n assessing the nature of the contacts between Dassault Aviation and Arkansas" (Pet. App. 3a). It also ignores what the Eighth Circuit did, which was to list various factors it considered relevant and apply them in co-equal fashion (including "the quantity of contacts that Dassault Aviation has with Arkansas" (*ibid.*)), and discuss "traditional notions of fair play and substantial justice" as if it were the overarching due process inquiry (rather than the second stage in a two-step inquiry). Pet. App. 8a, 9a. Respondent's suggestion that the Eighth Circuit conducted the two-step inquiry mandated by this Court's decisions and required in other circuits (see Pet. 17-18, 19-20) is wishful thinking.

As explained above, respondent in any event does not deny that the decision below ignores this Court's recent teachings and conflicts with the decisions of other courts by (a) failing to analyze specific and general jurisdiction separately, and (b) failing

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to a normal, run-of-the-mill parent-subsidiary relationship." *Amicus* Br. 9-10.

to give "substantial weight" to Dassault's status as a non-U.S. corporation. See Pet. 18-19, 21. Nor does respondent deny that the distinction between upholding general and upholding specific jurisdiction has profound ramifications for a defendant. See Pet. 26-27 & n.9. These undisputed conflicts alone justify the Court's review of the second question presented.

Respondent faults us for criticizing the test set forth in *Aftanase* v. *Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965), because "the panel did not rely on, or even cite," that case. Opp. 20. But we were careful in the petition to say that the panel balanced *six factors* (see Pet. 6); that the *Aftanese* test used by the district court, by the Eighth Circuit in other cases, and by the courts in four States, includes *five similar but not identical factors* (Pet. 20); and that the panel's analysis in this case merely "owes an obvious intellectual debt" to *Aftanese* (Pet. 22 n.5), which is indisputable. See Pet. 20-22 nn.4-5.

Although any decision by this Court to address the *International Shoe* test promises significant benefits to lower courts and litigants throughout the country, this case is an ideal vehicle because it originates in the Eighth Circuit, a court especially in need of correction because it "has meandered among variations of a multi-factor balancing test that merely pays lip service to this Court's earlier decisions while ignoring this Court's more recent doctrinal developments." Pet. 11; accord Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 840-42 (2004) (Eighth Circuit's "whole-hog" approach "collapses the general jurisdiction, specific jurisdiction, and fair play and substantial justice analysis into one sweeping inquiry," "intermingle[s] specific and general jurisdiction principles," and creates serious uncertainty); *Amicus* Br. 7.[3]

3. *Respondent's Arguments On The Merits.* Unable to deny plausibly the conflicts in the lower courts or the impor-

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[3] Inexplicably, respondent devotes many pages (Opp. 11-13, 16) to arguing that, under *International Shoe*, a foreign corporation need not be physically present in the forum to be subject to jurisdiction there. Dassault has never suggested otherwise.

tance of the issues presented, respondent devotes the bulk of her brief to arguing that the outcome below is correct. Although that effort is unavailing, what is striking is how much respondent relies on arguments the court below never invoked.

a. *The Newly Minted "Agency" Theory.* No fewer than 15 times in her brief, respondent states that Falcon Jet is Dassault's "agent." Opp. 13, 15 & n.5 (four times), 17, 18, 19 (twice), 24, 25, 27 (four times). There is nothing in the record, however, to support this mantra (which is raised for the first time in this Court). The district court *found otherwise*. See Pet. App. 19a ("[T]he evidence of record reveals nothing more than a typical corporate relationship between a parent and its wholly owned subsidiary."); *id.* at 18a ("none of the evidence" submitted by Anderson, including the "distributorship agreements" entered into by the two companies, demonstrates that Falcon Jet "was controlled" by Dassault or was Dassault's "instrumentality").

Nor is it true that the Eighth Circuit somehow relied on an agency relationship between Falcon Jet and Dassault, as respondent at one point suggests. See Opp. 17. The court of appeals made no mention of an agency relationship, and it left intact the district court's finding that the two entities had a normal parent-subsidiary relationship. Moreover, the Eighth Circuit's discussion of the supposedly "synergistic" or "symbiotic" relationship between Dassault and its subsidiary would have been wholly unnecessary (along with much else in the opinion below) if the court had believed there was an agency relationship.

Even if respondent were free to raise this argument (and she is not), the argument would have to be rejected. As the Eighth Circuit no doubt understood, a contractual relationship between a manufacturer and a distributor is simply not the same thing as the relationship between a principal and agent. Nor do any of the garden-variety provisions of the Dassault-Falcon Jet distributorship agreement quoted by respondent (see Opp. 14) demonstrate the existence of an agency relationship.

b. *The "Stream Of Commerce" Theory.* Respondent suggests that the Eighth Circuit could have properly exercised

jurisdiction over Dassault based on a "stream of commerce" theory (which is a form of specific jurisdiction). See Opp. 7-10, 22-23. She also invokes a number of "stream of commerce" cases involving distributors where the manufacturer's product was marketed in the forum and caused an injury there to a forum resident. *Id.* at 25-28. Notably, respondent observes that this jurisdictional theory "featured prominently in the arguments below" (Opp. 7) but cannot bring herself to say that the Eighth Circuit *actually relied* on a "stream of commerce" theory, because of course it did not.

There is a good reason the Eighth Circuit declined to credit this argument. As explained in the petition (at 29-30), this Court's cases make clear that the "stream of commerce" theory requires *an injury in the forum*. Respondent disagrees (Opp. 22), but she does not explain how this Court's cases could be read otherwise or cite a single case that supports her novel view.[4] Because the injury to respondent did not occur in Arkansas, the "stream of commerce" theory does not work.

Respondent's obvious intention to press a "stream of commerce" argument as an alternative basis for affirmance if review is granted makes this case more, not less, worthy of this Court's review – for the reasons set forth in the petition. See Pet. 28-30.

c. *The Specific Jurisdiction Theory*. Respondent also suggests that the Eighth Circuit could have exercised "specific jurisdiction" over Dassault on the ground that respondent's claim "arises out of" or "relates to" the French manufacturer's contacts with Arkansas. Opp. 21-22; see also Pet. 4 n.1, 18 (explaining the showing required for specific jurisdiction). In essence, she contends that her claims for defective manufacture

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[4] Understandably, respondent also makes no effort to defend the vast expansion of personal jurisdiction that would result if her novel variant of the "stream of commerce" theory were accepted. Under respondent's view, "stream of commerce" jurisdiction could be exercised in any State through which a manufacturer's product (or other products like it) passed, however transitorily, even if the product ultimately caused an injury half way around the world to a non-U.S. citizen. That cannot be right.

and design of the subject jet *by Dassault in France* (due to Dassault's installation there of a defective autopilot) "arose out of" the actions of *Falcon Jet in Arkansas*, undertaken after purchasing the plane from Dassault, in outfitting and decorating the plane to the specifications of Amway, Falcon Jet's customer, and in delivering the jet to Amway. Opp. 21-23.

Respondent's theory depends not only on the correctness of the Eighth Circuit's attribution ruling but also on a sweeping definition of the "arising out of" nexus required by the Due Process Clause. In *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-16 n.9 (1984), this Court reserved the question of the proper definition of "arising out of" or "relates to" in specific jurisdiction cases. Following *Helicopteros*, substantial confusion developed in the lower courts over the meaning of this nexus requirement. A decade ago this Court granted review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), to resolve that confusion but disposed of that case on another ground. See Pet. 9. As the Second Circuit has noted, the conflict in the lower courts has persisted, with "[s]ome Circuits" holding that "the conduct must be a proximate cause of the plaintiff's injury" or have "substantive relevance" to the plaintiff's underlying legal claim, whereas "[o]thers have held that it is sufficient if the defendant's conduct in the state is a 'but for' cause of the plaintiff's injury." *Chew* v. *Dietrich*, 143 F.3d 24, 29 (2d Cir.), cert. denied, 525 U.S. 948 (1998).

Respondent's argument for specific jurisdiction clearly flunks the "proximate cause" or "substantive relevance" test. Even if *Falcon Jet*'s Arkansas actions in outfitting and delivering the jet to Amway could properly be attributed to Dassault (and they cannot), those activities did not proximately cause respondent's alleged injuries and they have no substantive relevance to her defective design and manufacturing claims. See also Pet. 28. Moreover, in the absence of such attribution respondent also cannot satisfy the "but for" test, since *Dassault* had no contacts with Arkansas that could have qualified as the "but for" cause of her injuries in Michigan. Only if Falcon Jet's activities can be attributed to Dassault would respondent have

a colorable argument under the "but for" test. In any event, this theory would fail because the "but for" test is wrong. See No. 89-1647 Br. for Petitioner, *Carnival Cruise Lines* v. *Shute*, at 15-20; Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1444-45, 1458-62 (1988).

d. *The General Jurisdiction Theory*. Lastly, respondent contends that if the Eighth Circuit had applied the exacting test for general jurisdiction, and examined whether Dassault had "continuous" and "systematic" activities within Arkansas, it could have upheld jurisdiction. Opp. 23. But, as the district court noted, Dassault has *none* of the traditional indicia of corporate "presence" in Arkansas. Pet. 5. As both the district court and the Eighth Circuit acknowledged, Dassault itself had *no* direct contacts with Arkansas. See Pet. 27; Pet. App. 3a, 15a. Although respondent makes much of offhand statements in websites and corporate reports about Dassault's supposed "presence" in Arkansas "through" its Falcon Jet subsidiary (Opp. 5), there is simply no way for respondent to satisfy the demanding general jurisdiction test without attributing Falcon Jet's Arkansas contacts to Dassault. But, as explained above and in the petition, such attribution implicates an area of substantial confusion in the lower courts and violates due process.

4. *The Compelling Need For This Court's Guidance*. This Court has given very limited attention to personal jurisdiction issues in the past two decades, relative to the historically high level of attention and the frequency with which personal jurisdiction is litigated in the federal and state courts. Pet. 8-9, 23-24. The Court's staying its hand while lower courts and commentators refine important issues is a time-tested approach, but only "as long as the benefits of avoidance outweigh the problems." PERRY, DECIDING TO DECIDE 231 (1991). In the area of personal jurisdiction, including both of the issues presented in the petition, this tipping point has been reached.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2004

Supreme Court, U.S.
FILED
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(5)

No. 04-222

In the Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner Dassault Aviation submits this brief to call the Court's attention to a recent decision of the district court in this case on remand from the Eighth Circuit. A copy of the district court's opinion and order is reproduced in the addendum to this brief. Add. 1a-11a (per Wright, C.J.).

On November 16, 2004, the district court ruled that Michigan substantive law applies to respondent Anderson's claims against petitioner. The district court's opinion is relevant in several respects to the issues raised in the petition for a writ of certiorari.

1. As explained in our reply brief (at 2-3), respondent is simply wrong to characterize the Eighth Circuit's decision as not having ruled on the attribution issue. See also Pet. 6, 12, 15. Chief Judge Wright reads the Eighth Circuit's opinion the same way we do. See Add. 5a (noting that court of appeals rejected the principle "that the forum contacts of a subsidiary corporation *may not be used to find personal jurisdiction* over its nonresident parent company unless there is a basis for piercing the corporate veil") (emphasis added).

2. Chief Judge Wright also agrees with us (Pet. 7, 15; Reply Br. 4 & n.2) and with the *amici* (Br. 5, 9-10) that the Eighth Circuit applied a "synergistic relationship" test in deciding that attribution of Falcon Jet's Arkansas contacts to petitioner was appropriate. See Add. 5a ("the panel * * * found that * * * 'common sense' dictated that the 'close, synergistic relationship' * * * was such that jurisdiction over Dassault Aviation in this Court 'would be reasonable and fair'") (quoting Pet. App. 5a, 9a). Compare Opp. 18 ("The 'close, symbiotic relationship test' is a misleading and fantastical invention of the Petitioner.").

3. As explained in the petition (at 7, 15), the Eighth Circuit's decision leaves untouched the district court's finding that Falcon Jet is *not* petitioner's alter ego and that veil-piercing is

impermissible on this record. Chief Judge Wright agrees. See Add. 5a, 8a (taking note of Eighth Circuit's statement that petitioner's relationship with its subsidiary was "'not an abuse of the corporate organizational form'" and concluding that court of appeals accordingly "did not disturb" the district court's previous finding that the requirements of the "alter ego" doctrine could not be satisfied) (quoting Pet. App. 5a). Thus, Chief Judge Wright's opinion confirms that this case is an especially clean vehicle for resolving the first question presented in the petition.

4. The district court's recent decision also confirms that, contrary to respondent's contention (see Opp. 21-23), specific jurisdiction cannot be asserted in this case because respondent's claims do not "arise out of" any contacts of petitioner with Arkansas. See Reply Br. 8-9. As Chief Judge Wright explained in the course of resolving the choice-of-law issue:

> *[N]othing* of relevance to this action is alleged to have occurred in Arkansas. * * * Anderson is a Michigan resident, the accident occurred in Michigan, the flight in question originated in Michigan, and the aircraft was owned by Anderson's employer, a Michigan Corporation. In addition, * * * the design and manufacture of the subject aircraft and the Honeywell autopilot at issue *had no connection to Arkansas*.
>
> The only "contact" that Arkansas has to the litigation is that Dassault Aviation's subsidiary – Dassault Falcon Jet – operates a large completion center and service base in the state. However, the mere fact that the subject aircraft may have been painted and customized in Arkansas *by Dassault Falcon Jet* where it was then sold to Anderson's Michigan employer some years prior to the accident is not, for purposes of interstate and international order, so significant a contact *on the part of Dassault Aviation*, which had passed title to the aircraft in France prior to its entry into Arkansas, that Michigan law should be trumped in favor of Arkansas law.

Add. 7a-8a (emphasis altered) (footnote omitted).

5. As part of its choice-of-law analysis, the district court ruled that "Arkansas's governmental interests in this matter are slight." Add. 9a. Chief Judge Wright acknowledged that the Eighth Circuit, in conducting the personal jurisdiction analysis, had "stated that 'Arkansas has a substantial interest in the matter to be litigated, as the safety of Falcon jets affects the state's consumers and workers who encounter Dassault Aviation's products.'" *Ibid.* (quoting Pet. App. 9a). But "[t]hese statements," she noted, "did [not] address Arkansas' choice of law considerations." Add. 10a. She added:

> [A]pplying the Eighth Circuit's statements in this choice of law context would mean that Arkansas would have an interest in having its law apply to every accident involving a Dassault Aviation aircraft that was at some point painted and customized in Arkansas – no matter where in the world such an accident might occur – simply because of the presence in Arkansas of Dassault Aviation's wholly owned subsidiary.

Ibid. "[S]urely," Chief Judge Wright observed, the Eighth Circuit "could not have intended such a far reaching pronouncement as to choice of law." *Ibid.*

Precisely the same criticism, of course, could be leveled at the Eighth Circuit's rationale underlying its personal jurisdiction holding. Moreover, as we explained in our reply, respondent's novel variant of the "stream of commerce" theory suffers from the same critical flaw identified by Chief Judge Wright. See Reply Br. 8 n.4 ("Under respondent's view, 'stream of commerce' jurisdiction could be exercised in any State through which a manufacturer's product (or other products like it) passed, however transitorily, even if the product ultimately caused an injury half way around the world to a non-U.S. citizen. That cannot be right.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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**Counsel of Record*

NOVEMBER 2004

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

BEVERLY ANDERSON,	*	[FILED:
	*	NOV 16 2004]
Plaintiff,	*	
vs.	*	No. 4:02cv00629 SWW
	*	
DASSAULT AVIATION,	*	
	*	
Defendant/	*	
Third-Party	*	
Plaintiff,	*	
vs.	*	
	*	
HONEYWELL, INC.	*	
	*	
Third-Party	*	
Defendant.	*	

BEVERLY ANDERSON,	*	
	*	
Plaintiff,	*	
vs.	*	No. 4:04cv00798 SWW
	*	
DASSAULT FALCON JET	*	
CORPORATION and	*	
HONEYWELL, INC.,	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

Beverly Anderson ("Anderson"), a flight attendant on a jet manufactured by Dassault Aviation, a French corporation headquartered in Paris, France, brings this consolidated action

against Dassault Aviation, Dassault Falcon Jet Corporation ("Dassault Falcon Jet"), and Honeywell, Inc., seeking damages for injuries she claims to have suffered when the jet on which she was a flight attendant underwent a series of pitch oscillations while on a flight from Portland International Airport in Oregon to Kent County International Airport in Michigan. The matter is before the Court on motion of Dassault Aviation for an Order declaring that Michigan substantive law applies to all claims against it in this action [doc.#36]. Anderson has responded in opposition to Dassault Aviation's motion, and Dassault Aviation has filed a reply to Anderson's response. Having carefully considered the matter, the Court finds that Dassault Aviation's motion for an Order declaring that Michigan substantive law applies to all claims against it in this action should be and hereby is granted.

I.

According to the complaint, on October 10, 1999, Anderson, a Michigan resident, was a flight attendant on a Dassault Falcon 900B jet, which was owned by her employer, Amway Corporation, a Michigan corporation. The jet was approaching its intended destination, Grand Rapids Michigan, when the pilot pulled back on the controls in an effort to disengage the autopilot and level off the aircraft. The digital flight computer responded to this external pitch up maneuver by initiating a nose down trim motion. The combination of these two events caused the jet to undergo a series of pitch oscillations between a 3-degree aircraft nose up and a 4.5 degree aircraft nose down. Anderson, who was in the galley readying the plane for landing when the pitch oscillations occurred, was thrown about in the jet, causing her to violently bounce off the floor and ceiling several times, resulting in severe injuries.

Anderson filed suit in the United States District Court for the Western District of Michigan against Dassault Aviation, as well as Honeywell, a corporation headquartered in Minnesota at the

time of the accident and the manufacturer of the autopilot,[1] and Dassault Falcon Jet, a wholly-owned subsidiary of Dassault Aviation headquartered in New Jersey that sells and supports Dassault Falcon Jets throughout North and South America and the Pacific Rim countries of Asia, including the People's Republic of China. Dassault Aviation subsequently filed a motion to dismiss for lack of personal jurisdiction. Anderson responded in opposition to Dassault Aviation's motion and also requested that the entire action be transferred to Arkansas, where Dassault Falcon Jet operates a large "completion center and service base."

By Order dated October 4, 2002, the district court granted Dassault Aviation's motion to dismiss for lack of personal jurisdiction and denied without prejudice Anderson's motion to transfer the action to Arkansas. *See Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D. Mich. Oct. 4, 2002). In so ruling, the district court stated that "[i]n the event [Anderson] in successful in establishing that Dassault Aviation is subject to personal jurisdiction in Arkansas, [Anderson] may renew her request for transfer as to the remaining Defendants in this case." *Id.*

On October 10, 2002, Anderson filed suit against Dassault Aviation in this Court, asserting that the jet manufactured and sold by Dassault Aviation was in a defective condition which rendered it unreasonably dangerous, and that Dassault Aviation is strictly liable for her damages as a supplier of a defective product. Anderson's action against Honeywell and Dassault Falcon Jet remained pending in the Western District of Michigan, awaiting a ruling from this Court on whether Dassault Aviation is subject to personal jurisdiction in Arkansas.[2]

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[1] Honeywell has since established its headquarters in New Jersey following a merger.

[2] According to pleadings in the Michigan litigation, Dassault Aviation has

Dassault Aviation subsequently moved this Court to dismiss Anderson's complaint for lack of personal jurisdiction. Dassault Aviation argued dismissal for lack of personal jurisdiction was warranted because the cause of action occurred in Michigan, Anderson is a Michigan resident, Anderson's medical treatment occurred in Michigan where she resides, and Dassault Aviation is a French corporation having no contacts with Arkansas sufficient to support general jurisdiction consistent with the limitations placed upon the Court by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Arkansas' long-arm statute, Ark. Code Ann. § 16-4-101. Anderson, on the other hand, in what essentially was an alter ego argument, argued that Dassault Aviation was subject to personal jurisdiction in this Court as it "has progressively adopted a course of action to purposefully blur the distinction between [Dassault Aviation] and its exclusive distributor and wholly owned subsidiary, Dassault Falcon Jet," that Dassault Falcon Jet's activities are "imputed" to Dassault Aviation, that Dassault Aviation and Dassault Falcon Jet share two officers, and that "[t]he business jet in this case was 'completed' *and* delivered in Little Rock, Arkansas to Ms. Anderson's employer."

By Memorandum and Order dated April 29, 2003, this Court, relying in large part on the Eighth Circuit's then-recent opinion in *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642 (8th Cir. 2003), granted Dassault Aviation's motion to dismiss for lack of personal jurisdiction.[3] This Court determined that Anderson

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been served in France in accordance with the requirements of the Hague Convention. *See Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D.Mich.) (Pl. Br. at 2 (10-3-03)).

[3] In *Epps*, the Eighth Circuit held that in situations in which the defendant is a nonresident parent corporation, "personal jurisdiction can be based on the activities of the nonresident corporation's in-state subsidiary, but only if the parent so controlled and dominated the affairs of the subsidiary that the latter's corporate exercise was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's ego." *Id.* at

failed to link Dassault Aviation to Arkansas except as a parent corporation and that Dassault Aviation's mere ownership of Dassault Falcon Jet was insufficient to justify subjecting it to this Court's jurisdiction. *See* Mem. and Order at 12.

A panel of the Eighth Circuit reversed. Apparently disavowing *Epps*' ruling that the forum contacts of a subsidiary corporation may not be used to find personal jurisdiction over its nonresident parent company unless there is a basis for piercing the corporate veil, the panel instead found that "whether or not Dassault Falcon Jet is [Dassault Aviation's] alter ego," "common sense" dictated that the "close, synergistic relationship" between Dassault Aviation and Dassault Falcon Jet, although "not an abuse of the corporate organizational form," was such that jurisdiction over Dassault Aviation in this Court "would be reasonable and fair." *Anderson v. Dassault Aviation*, 361 F.3d 449, 453, 455 (8th Cir. 2004).

Following the Eighth Circuit's determination that Dassault Aviation is subject to personal jurisdiction in Arkansas, the district court in Michigan transferred Anderson's action against Honeywell and Dassault Falcon Jet, *Anderson v. Dassault Aviation, et al.*, No. 1:01cv00640 (W.D. Mich.), to this Court. Anderson subsequently moved to consolidate the two actions and this Court, by Order dated September 27, 2004, granted Anderson's motion.

II.

Dassault Aviation moves for an Order declaring that Michigan substantive law applies to all claims against it in this action on grounds that Michigan is the only state with significant connections to this case and, thus, it is the only state with significant interests at stake. Anderson, in turn, argues that Michigan has no interest in applying its producer protective laws in the present action to the detriment of one of its residents.

648-49.

A.

This Court applies Arkansas choice of law principles in determining which state's law applies to plaintiff's claims against Dassault Aviation. *See Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 673 (8th Cir. 2004) ("A district court applies the law of the forum state when exercising its diversity jurisdiction"); *Larken, Inc. v. Wray*, 189 F.3d 729, 732 (8th Cir.1999) ("A federal court must apply the choice of law rules of the forum state ...."). In that respect, the Arkansas Supreme Court has adopted Professor Robert A. Leflar's five-factor approach to deciding choice of law questions. *Miller*, 366 F.3d at 674 (citing *Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453, 456 (1977)). Arkansas has not, however, altogether discarded the more traditional approach represented by the *lex loci delicti* rule, *see id.* (citing *Gomez v. ITT Educ. Servs., Inc.*, 348 Ark. 69, 71 S.W.3d 542, 546 (2002)), that is, that a court should apply the substantive law of the place where the injury occurred. *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1359 (8th Cir.), *cert. denied*, 513 U.S. 964 (1994). Rather, "the adoption of the Leflar factors in *Wallis* and subsequent cases appears to be merely a softening of what previously has been a rigid formulaic application of the former rule of law." *Gomez*, 348 Ark. at 77, 71 S.W.3d at 546. Accordingly, this Court must consider the *lex loci delicti* rule within the framework of the five Leflar factors: (1) predictability of results; (2) maintenance of the interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Miller*, 366 F.3d at 674 (citing *Gomez*, 348 Ark. 69, 71 S.W.3d at 546).

B.

1.

The first of the five Leflar factors – predictability of results – is primarily aimed at avoiding forum shopping and ensuring uniform results. *Miller*, 366 F.3d at 674 (citing *Gomez*, 348

Ark. 69, 71 S.W.3d at 547). Predictability of results is not implicated when an action arises out of an accident, however, and as this suit does stem from an accident, this factor has no real relevance in ascertaining whether Arkansas or Michigan law should apply to this action. *See id.*; *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 620 (8th Cir. 2001).

2.

The second factor – maintenance of the interstate and international order – is not of great concern here as "[p]arties are unlikely to seek out Arkansas to undertake tortious behavior and thereby upset interstate order based on whether Arkansas or [Michigan] law applies in this case." *Miller*, 366 F.3d at 674 (citing *Gomez*, 348 Ark. 69, 71 S.W.3d at 547). In addition, this factor is generally not implicated if the state whose law is to be applied – in this case, Michigan – has "sufficient contacts with and interest in the facts and issues being litigated." *Hughes*, 250 F.3d at 620 (citation omitted). Conversely, "where a state has little or no contact with a case and nearly all of the significant contacts are with a sister state, the factor suggests that a state should not apply its own law to the dispute." *Id.* at 620-21 (internal quotation marks and citation omitted).

This factor points towards an application of Michigan law as the events surrounding Anderson's injuries occurred in Michigan. Indeed, *nothing* of relevance to this action is alleged to have occurred in Arkansas. As previously noted, Anderson is a Michigan resident, the accident occurred in Michigan, the flight in question originated in Michigan, and the aircraft was owned by Anderson's employer, a Michigan Corporation. In addition, Anderson received her medical treatment in Michigan, many accident and damages witnesses are in Michigan, and the design and manufacture of the subject aircraft and the Honeywell autopilot at issue had no connection to Arkansas.

The only "contact" that Arkansas has to the litigation is that Dassault Aviation's subsidiary – Dassault Falcon Jet – operates

a large completion center and service base in the state.[4] However, the mere fact that the subject aircraft may have been painted and customized in Arkansas by Dassault Falcon Jet where it was then sold to Anderson's Michigan employer some years prior to the accident is not, for purposes of interstate and international order, so significant a contact *on the part of Dassault Aviation*, which had passed title to the aircraft in France prior to its entry into Arkansas, that Michigan law should be trumped in favor of Arkansas law. In this respect, the Eighth Circuit, as previously noted, acknowledged that Dassault Aviation's and Dassault Falcon Jet's relationship was "not an abuse of the corporate organizational form," *see Anderson*, 361 F.3d at 453, and concluded that Dassault Aviation had sufficient contacts with Arkansas to support an Arkansas court's jurisdiction over it "whether or not Dassault Falcon Jet is its alter ego." *See id.* This Court thus presumes for today's purposes that the Eighth Circuit, although determining that there was a "close, synergistic relationship" between Dassault Aviation and Dassault Falcon Jet such that personal jurisdiction over Dassault Aviation in this Court "would be reasonable and fair," *see id.* at 453, 455, did not disturb this Court's conclusion in its Memorandum and Order granting Dassault Aviation's motion to dismiss that Anderson failed to show that Dassault Aviation "'so controlled and dominated the affairs of [Dassault Falcon Jet] that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the

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[4] In its Memorandum and Order granting Dassault Aviation's motion to dismiss for lack of personal jurisdiction, this Court noted that "completion" in this context refers only to the fact that new Falcon jets are flown in "green" condition (equipped with basic avionics, but without exterior paint or passenger interior, or without optional equipment) from the factory in France to, among other places, Little Rock, Arkansas, where they are "completed" to customer specifications. Mem. and Order at 10. In this respect, it was undisputed that in 1994 Dassault Falcon Jet Corporation purchased the jet in France from Dassault Aviation, took title to and possession of the jet in France, and *then* brought the jet into Arkansas, "completed" it, and sold it to Anderson's employer. *Id.*

nonresidential corporate defendant's alter ego,' thus imputing Dassault Falcon Jet Corporation's acts to Dassault Aviation." *See* Mem. and Order at 9-10 (quoting *Epps*, 327 F.3d at 649).

3.

The third factor – simplification of the judicial task – is not at issue here as application of either state's law will not simplify this Court's task. A federal district court is often faced with the task of applying some state's law other than that of the forum state, and this Court is equally capable of resolving the dispute under Michigan or Arkansas law. *See Miller*, 366 F.3d at 674; *Hughes*, 250 F.3d at 620.

4.

The fourth factor – advancement of the forum's governmental interests – does not support an application of Arkansas law as Arkansas's governmental interests in this matter are slight and would not be advanced by any such application given that Anderson is a Michigan resident and the events surrounding her injuries occurred in Michigan. "Absent some relevant connection between a state and the facts underlying the litigation, we fail to see how any important Arkansas governmental interest is significantly furthered by ensuring that nonresidents are compensated for injuries that occur in *another state*." *Hughes*, 250 F.3d at 621 (emphasis in original). *See also Gomez*, 348 Ark. at 78, 71 S.W.3d at 547 ("[a]pplying Arkansas law to this case would do little or nothing to advance Arkansas' governmental interests, as no citizen of Arkansas is involved").

It is true that in determining that Dassault Aviation was subject to personal jurisdiction in Arkansas, the Eighth Circuit stated that "Arkansas has a substantial interest in the matter to be litigated, as the safety of Falcon jets affects the state's consumers and workers who encounter Dassault Aviation's products." *See Anderson*, 361 F.3d at 455. The Eighth Circuit immediately followed this statement by stating that "[t]hough the injury did not occur in Arkansas, and Ms. Anderson is not

an Arkansas resident, the jet at issue here was completed and delivered to its buyer in Arkansas, as are many Falcon jets." *See id.* These statements were made without citation to any authority and, failing as they did to address Arkansas' choice of law considerations (as well as the Eighth Circuit's own precedent in *Miller*, 366 F.3d 672, and *Hughes*, 250 F.3d 618), can only be considered to have been made solely in the context of personal jurisdiction analysis and not intended to apply to any choice of law analysis. Indeed, applying the Eighth Circuit's statements in this choice of law context would mean that Arkansas would have an interest in having its law apply to every accident involving a Dassault Aviation aircraft that was at some point painted and customized in Arkansas – no matter where in the world such an accident might occur – simply because of the presence in Arkansas of Dassault Aviation's wholly owned subsidiary. The Eighth Circuit may have been concerned that Anderson had a forum "available to her in this country" for her suit against Dassault Aviation and concluded that Arkansas "seem[ed]" to be the appropriate forum for the litigation, *see Anderson*, 361 F.3d at 455, but it surely could not have intended such a far reaching pronouncement as to choice of law.

5.

The fifth factor – application of the better rule of law – does not reflect a subjective judicial preference for one state's more or less elegant law, but is aimed at avoiding the application of unfair or archaic laws. *Miller*, 366 F.3d at 675 (citing *Hughes*, 250 F.3d at 621). Although Michigan law may include tort reform provisions that, in the words of Anderson, are "producer protective" and "corporate friendly," this Court cannot say that Michigan law is unfair or archaic. Moreover, "[c]ourts often refrain from resolving a conflict of law question based on the better rule of law factor, recognizing that states often have competing policy considerations for governing similar transactions or events in different manners such that the laws do not necessarily lend themselves to being labeled either 'better' or 'worse.'" *Hughes*, 250 F.3d at 621. This Court similarly

declines to determine this choice of law question based on which state's law is better, particularly considering that the other Leflar factors point decidedly towards the application of Michigan law. *See id.* (noting that "[o]ur court has been especially hesitant to pronounce the better law when other Leflar factors point decidedly towards the application of one state's law").

6.

Finally, the Court notes that an additional consideration in favor of applying Michigan substantive law is that Anderson herself chose Michigan as the forum for this litigation when she first filed it. The case is before this Court solely because the district court in Michigan found that it lacked personal jurisdiction over Dassault Aviation. Nothing in the law or the facts even remotely suggested that Arkansas law should apply until this litigation was instigated. It can hardly be unfair to Anderson to apply the substantive law of her preferred forum.

III.

In sum, having considered the traditional *lex loci delicti* rule – that a court should apply the substantive law of the place where the injury occurred – within the framework of the five Leflar factors, this Court determines that Michigan substantive law applies to all claims against Dassault Aviation in this action.

IT IS THEREFORE ORDERED that Dassault Aviation's motion for an Order declaring that Michigan substantive law applies to all claims against it in this action [doc.#36] be and it hereby is granted.

Dated this 16th day of November 2004.

/S/ [Susan Webber Wright]
CHIEF JUDGE
UNITED STATES DISTRICT COURT

MOTION FILED
OCT 18 2004

(2)

No. 04-222

IN THE

Supreme Court of the United States

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, the Organization for International Investment and the Chamber of Commerce of the United States move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for the Petitioner has consented to the filing of this brief, but counsel for the Respondent has withheld consent.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government. OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. While the Chamber's membership includes most of the country's largest companies, 96 percent of its members are small businesses with fewer than 100 employees. The Chamber's members transact business in all or nearly all of the states of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of

national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

These organizations regularly file briefs as *amici curiae* in cases such as this one that raise issues of vital concern to the business community. In this case, OFII and the Chamber seek to assist the Court in exploring the practical consequences for interstate and international commerce of the due process limits on exercising *in personam* jurisdiction over nonresident defendants.

OFII and the Chamber believe that the Petition in this case raises issues that are critical to the clarification of the due process limits on *in personam* jurisdiction. The Petition has detailed the chaotic state of the law in the lower courts over the constitutional limits on the exercise of *in personam* jurisdiction, and, in particular, on the assertion of *in personam* jurisdiction over nonresident parent corporations based solely on the forum contacts of separately incorporated subsidiaries. This case provides the Court with a singular opportunity to address and resolve this doctrinal confusion. Members of OFII and the Chamber depend on a stable and predictable legal framework to conduct business around the globe. In their view, the decision below undermines that framework by permitting states to subject nonresident corporations to *in personam* jurisdiction based only on the forum contacts of affiliated corporations, without any basis for disregarding their separate corporate existences.

The brief of *amici curiae*, however, offers a broader perspective than that of the Petitioner on the importance of this Court's review in the instant case. In the accompanying brief, *amici* focus on the negative consequences for international trade and investment in the United States of this doctrinal confusion and of the specific approach adopted by the Eighth Circuit. OFII and the Chamber believe that this perspective is not only relevant but indeed vital to a full appreciation of the need for review by this Court.

For the foregoing reasons, the motion of OFII and the Chamber for leave to file the accompanying brief as *amici curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
BRIEF OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. CONFUSION AMONG THE LOWER COURTS THREATENS A STABLE AND PREDICTABLE LEGAL ENVIRONMENT FOR NATIONAL AND INTERNATIONAL BUSINESS	4
II. THE EIGHTH CIRCUIT'S DECISION CONSTITUTES JURISDICTIONAL OVERREACHING THAT INTERFERES WITH THE CONDUCT OF INTERNATIONAL BUSINESS	7
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Anderson v. *Dassault Aviation*, 361 F.3d 449 (8th Cir. 2004) 2
Bridgestone Corp. v. *Lopez*, 131 S.W.3d 670 (Tex. App. 2004) 5
Cannon Mfg. Co. v. *Cudahy Packing Co.*, 267 U.S. 333 (1925) 4
Central States, Southeast & Southwest Areas Pension Fund v. *Reimer Express World Corp.*, 230 F.3d 934 (2000) 4
Helicopteros Nacionales de Colombia, S.A. v. *Hall*, 466 U.S. 408 (1984) 11
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 3, 5
United States v. *Bestfoods*, 524 U.S. 51 (1998) 4, 8
World-Wide Volkswagen v. *Woodson*, 444 U.S. 286 (1980) 3, 6, 8

OTHER AUTHORITY

William J. Zeile, U.S. Dep't of Commerce, *Operations of U.S. Affiliates of Foreign Companies* (Aug. 2004), *available at* http://www.bea.gov/bea/ARTICLES/2004/08August/0804FDIUS.pdf 12

BRIEF OF *AMICI CURIAE*

Under cover of the accompanying motion pursuant to Rule 37.2(b) of the Rules of this Court, the Organization for International Investment and the Chamber of Commerce of the United States respectfully submit this brief as *amici curiae* in support of Petitioner seeking a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.[1]

As discussed at greater length in the accompanying motion, *amici curiae* are business associations with a substantial interest in ensuring stable and predictable legal regimes affecting the conduct of international trade and investment. The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation with an underlying membership of nearly three million U.S. businesses and organizations, which transact business in all or nearly all of the states of the United States, as well as in a large number of countries around the world.

Amici curiae view the jurisdictional ruling at issue in this case not only as contributing to an environment of legal uncertainty, but also as a serious threat to their members' business operations. Any decision with such global implications warrants this Court's intervention. The reasoning of the decision below would vastly and unfairly increase the *amici*'s members' exposure to suit in jurisdictions with which they have no sustained or regular

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for either party has authored this brief in whole or in part.

contacts, simply by virtue of the national or multinational reach of their corporate affiliations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Dassault Aviation's petition clearly demonstrates that the circuit court's decision in *Anderson* v. *Dassault Aviation*, 361 F.3d 449 (8th Cir. 2004), conflicts with precedents of this Court and is emblematic of confusion among the lower courts concerning the due process limits on *in personam* jurisdiction over nonresident corporate defendants. *Amici curiae* readily agree with the arguments advanced in the Petition, and therefore urge this Court to grant the petition for a writ of certiorari for the reasons stated therein. *Amici*, however, are equally concerned with the broad commercial implications of this confusion and of certain particularly worrisome aspects of the Eighth Circuit's decision.

In this brief, *amici curiae* will focus on the negative consequences for the conduct of international trade and investment that result from the confusion among the lower courts surrounding the due process limits on exercising *in personam* jurisdiction over nonresident corporate defendants. Lower courts around the country have adopted an assortment of widely varying and irreconcilable tests for deciding when to impute the forum contacts of a subsidiary corporation to a foreign parent corporation that has no direct or sustained contacts of its own with that forum, for the purpose of asserting jurisdiction over that parent corporation. This pervasive confusion not only leads to frequent litigation of cases concerning the exercise of *in personam* jurisdiction over such a defendant, but also undermines the stable and predictable legal environment crucial to the conduct of global business.

Amici also wish to highlight the serious risks to national and global commerce if the Eighth Circuit's expansive theory

of *in personam* jurisdiction is allowed to stand and guide the assertion of jurisdiction in the lower courts. The Eighth Circuit relied on several factors present in a typical parent-subsidiary relationship to find that a nonresident foreign parent corporation had a "close, synergistic" relationship with its subsidiary. Based on that finding, the court proceeded to attribute the subsidiary's forum contacts to the parent (which had no contacts of its own with that forum), and therefore to assert personal jurisdiction over the parent corporation. Thus, under the Eighth Circuit's approach, a nonresident parent corporation with no direct contacts with a forum would essentially be subject to *in personam* jurisdiction in *any* state where one of its subsidiaries does business. Such an approach would greatly increase a foreign parent company's exposure to suit as well as increase the costs of doing business, thereby discouraging investment in the United States.

ARGUMENT

The Eighth Circuit held that the district court could maintain *in personam* jurisdiction over Dassault Aviation, a French manufacturer of business jets with no forum contacts of its own, by virtue of, *inter alia*, the forum contacts of Dassault Falcon Jet, a separately incorporated subsidiary. The jurisdictional decision below extends the reach of Arkansas' long-arm statute well beyond the limits prescribed by the Constitution's Due Process Clause. Those limits were outlined by this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286 (1980), and their progeny, but have been applied inconsistently by the lower courts, as the Petition ably discusses in great detail. See Pet. 12-24. *Amici curiae* believe that this confusion alone warrants the Court's review, and they will not repeat the Petitioner's arguments here. Instead, *amici* wish to draw the Court's attention to the significant negative consequences for

business and investment in the United States that arise from the confusion prevailing in the lower courts. In addition, *amici* wish to focus on the negative consequences for national and global businesses of the particular species of jurisdictional overreaching endorsed by the Eighth Circuit in this case.

I. CONFUSION AMONG THE LOWER COURTS THREATENS A STABLE AND PREDICTABLE LEGAL ENVIRONMENT FOR NATIONAL AND INTERNATIONAL BUSINESS.

The Petition presents an opportunity for this Court to address and resolve two key jurisdictional issues that have been the subject of doctrinal and decisional conflicts among the lower courts. By reviewing the decision below, the Court could establish a more stable and predictable legal environment in which global companies can operate.

Some courts, following this Court's decisions in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), and *United States* v. *Bestfoods*, 524 U.S. 51 (1998), have refused to attribute a subsidiary's contacts to its parent so long as corporate formalities have been maintained, even if only formally. See Pet. 13-14. Many other courts have rejected the standard in *Cannon*, arguing that this Court's more recent decision in *International Shoe* controls. See *id.* at 14-16.

But even the courts that purport to apply *International Shoe* use very different approaches. Some have imputed the forum contacts of a subsidiary to a nonresident parent corporation if circumstances would permit the courts to pierce the corporate veil of the subsidiary under tests specified in state corporations law. See *id.* at 14; see, *e.g.*, *Central States, Southeast & Southwest Areas Pension Fund* v. *Reimer Express World Corp.*, 230 F.3d 934, 943-45 (7th Cir. 2000). State law, of course, carries with it a welter of different approaches. There is no uniform standard. Courts have

embraced a number of different tests for when they will actually pierce a corporate veil—*e.g.*, instrumentality cases, alter-ego cases, agency cases, etc. Thus, clarification is also much needed as to when corporate veil-piercing scenarios permits the exercise of *in personam* jurisdiction.

Still other courts have adopted more novel approaches to determining when to impute the forum contacts of a subsidiary to its parent, without reference to the legal doctrines of corporate veil-piercing. For example, in the decision below, the Eighth Circuit relied on the existence of a "close, synergistic" or "symbiotic" relationship between the parent and the subsidiary to impute the subsidiary's forum contacts to the parent corporation, thereby allowing the court to assert *in personam* jurisdiction over the nonresident parent. Likewise, a Texas court of appeals recently asserted personal jurisdiction over a nonresident parent, for claims arising in Mexico, after attributing the forum contacts of its subsidiary to the parent under a "single business enterprise" theory. See *Bridgestone Corp.* v. *Lopez*, 131 S.W.3d 670, 681-86 (Tex. App. 2004). According to the Texas court, this theory applies "when corporations integrate their resources and operations to achieve a common business purpose." *Id.* at 681.

Second, there is considerable confusion among the lower courts with respect to the application of the jurisdictional standard outlined in this Court's decisions in *International Shoe*, *World-Wide Volkswagen*, and their progeny. Lacking recent guidance from this Court, the lower courts have adopted varied and often inconsistent approaches for applying the jurisdictional standard first elaborated in this Court's decision in *International Shoe*. It is axiomatic that a state can exercise *in personam* jurisdiction over a defendant, consistent with due process, when that defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316.

As discussed in the Petition, many courts have interpreted this requirement of *International Shoe* and its progeny to require a two-step analysis—determining first whether a defendant has certain "minimum contacts" and second whether the exercise of such jurisdiction would offend "traditional notions of fair play and substantial justice." See Pet. 17-22. But not all courts have followed this two-step approach. In the decision below, for example, the Eighth Circuit employed a five-factor balancing test to determine whether it could properly exercise *in personam* jurisdiction over Dassault Aviation, with the sufficiency of a defendant's contacts as merely one of the factors to be considered. *Id.* at 17-20.

The current state of confusion among the lower courts on both points denies businesses any assurance that they can rely on their corporate structures to order their business activities or manage attendant risks. It therefore poses a serious threat to the stable and predictable legal environment that is crucial to the operation of multinational companies in the United States, and to a healthy commercial and economic environment. *Amici*'s members require predictable legal rules in order to operate their businesses effectively, and the current state of legal disarray artificially distorts business decision-making. Overseas businesses that are concerned that their contacts with U.S. subsidiaries will expose them to the risks of forum shopping will either refuse to do business in this country or alter their methods of distributing goods and services without regard to consumer preferences. This Court has recognized the value of predictability resulting from an "'orderly administration of the laws.'" *World-Wide Volkswagen*, 444 U.S. at 297 (quoting *International Shoe*, 326 U.S. at 319).

The lower courts' use of a variety of tests also encourages forum shopping by plaintiffs looking for the most favorable treatment for the specific facts of their cases. Indeed, that was the situation in the present case. Respondent first filed

suit in the Western District of Michigan against Dassault Aviation, Dassault Falcon Jet, and Honeywell, Inc. (the manufacturer of the allegedly defective autopilot that caused the accident). See generally Pet. App. 22a-29a. The district court in Michigan, however, held that it did not have personal jurisdiction over Dassault Aviation, and granted Dassault Aviation's motion to dismiss.[2] See *id.* at 22a, 29a. Respondent then turned to the Eastern District of Arkansas, where Respondent re-filed her suit against Dassault Aviation—and benefited from the Eighth Circuit's more generous jurisdictional test. Likewise, thanks to its expansive rule, the Eighth Circuit will continue to attract litigants aspiring to reach into the deep pockets of parent companies outside the forum, based solely on the activities of separate but affiliated entities.

II. THE EIGHTH CIRCUIT'S DECISION CONSTITUTES JURISDICTIONAL OVERREACHING THAT INTERFERES WITH THE CONDUCT OF INTERNATIONAL BUSINESS.

As much as *amici* are concerned about the confused state of the law of personal jurisdiction, they are particularly troubled by the specific approach adopted by the Eighth Circuit because it poses grave threats to the conduct of national and global commerce.

For *amici*, the alarming aspect of the Eighth Circuit's decision was its rationale for asserting *in personam* jurisdiction over Dassault Aviation, a nonresident corporation with no contacts of its own with that forum, based solely on the forum contacts of its separately incorporated subsidiary, Dassault Falcon Jet. The Eighth Circuit's approach is disconcerting not only because it has the potential of rendering key protections of the corporate form effectively

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[2] Respondent's suit against Dassault Falcon Jet and Honeywell has since been transferred to the Eastern District of Arkansas and consolidated with the action below against Dassault Aviation.

meaningless, but also because it carries serious implications for the operation of normal, run-of-the-mill parent-subsidiary relationships.

In exercising personal jurisdiction over Dassault Aviation, the Eighth Circuit first rejected the district court's finding that a subsidiary's contacts could be imputed to a nonresident parent corporation only when that subsidiary's corporate veil could be pierced as a matter of state law. The circuit court found that "neither physical presence in Arkansas nor piercing Dassault Falcon Jet's corporate veil is required to establish the minimum contacts necessary for the exercise of personal jurisdiction in Arkansas." Pet. App. 5a.

The Eighth Circuit's approach to *in personam* jurisdiction therefore deliberately disregards the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *Bestfoods*, 524 U.S. at 61. It also ignores the "equally fundamental principle of corporate law," that a subsidiary's corporate veil may be pierced only "when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.* at 62.

These two principles serve to encourage investment by limiting a shareholder's liability to its investment, while at the same time ensuring that that protection is not abused. However, under the Eighth Circuit's approach, companies would be stripped of these crucial protections and rights that are part and parcel of establishment under the corporate form. The Eighth Circuit's approach would effectively eliminate the ability of foreign parent companies, like Dassault Aviation, to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 US at 297. Such an outcome will necessarily discourage investment in the U.S. market.

In asserting *in personam* jurisdiction over Dassault Aviation, the Eighth Circuit relied on the "close, synergistic relationship that is not an abuse of the corporate organizational form" between Dassault Aviation and Dassault Falcon Jet to impute Dassault Falcon Jet's forum contacts to Dassault Aviation. Pet. App. 5a. This "close, synergistic relationship" between Dassault Aviation and Dassault Falcon Jet was also later referred to by the Eighth Circuit as "closely intertwined" and "symbiotic." *Id.* at 7a, 9a.

The approach adopted in the decision below is especially troubling to *amici* because the Eighth Circuit found a "symbiotic" relationship to exist in this case solely by reference to several factors that are commonplace to a normal, run-of-the-mill parent-subsidiary relationship. The circuit court found that Dassault Aviation "*benefit[ed] greatly* from Dassault Falcon Jet's exclusive distribution of its business jets throughout the western hemisphere, and Dassault Aviation ha[d] a *clear awareness of* and *interest in* its subsidiary's substantial operations in Arkansas." Pet. App. 5a (emphasis added). Moreover, this awareness of and interest in Dassault Falcon Jet was evidenced by, *inter alia*, informational statements about Dassault Falcon Jet's operations in Dassault Aviation's Annual Report and on a website jointly operated by Dassault Aviation and Dassault Falcon Jet. *Id.* at 5a-7a.

It simply cannot be the case, however, that the fact that a foreign parent corporation is aware of, or benefits from, or is interested in its subsidiary's operations, could justify the imputation of that subsidiary's contacts to a nonresident parent corporation. Indeed, it is doubtful that a parent corporation would ever willingly establish a subsidiary where it would not be aware of the subsidiary's operations or intend to benefit from them. Under such an expansive theory, all parent-subsidiary relationships would constitute "close, synergistic" or "symbiotic" relationships. It is hard to imagine how in the future *any* nonresident parent corporation with a subsidiary with business activities in a particular state

could ever avoid having the subsidiary's forum contacts imputed to it under such a theory. Thus, multinational corporations may soon find themselves vulnerable to suit anywhere in the country, even if they themselves do business nowhere in the country.

Even more, the Eighth Circuit pointed to the fact that both companies used "Dassault" in their name and shared a common logo as part of an attempt to "consolidate the image and operations of the two companies" and as part of a "unified marketing strategy." Pet. App. 7a-8a. Additionally, the circuit court noted that the President and CEO of Dassault Falcon Jet were also officers and directors of Dassault Aviation and that the companies shared a website. *Id.* at 7a. Many, if not most, parent corporations and their subsidiaries, however, will employ the same word in their names and use a common logo. Likewise, it is not unusual for such companies to have shared directors and officers, or a common website. Indeed, even companies not tied by equity stakes may share such features. These facts relied on by the Eighth Circuit do not suggest anything out of the ordinary in commercial relationships and should not serve as a basis for the assertion of personal jurisdiction.

Indeed, a formula this imprecise, which could well describe any national or multinational affiliation of businesses, including even those not formally linked by equity stakes, is itself problematic and, in fact, could lead to absurd results. Consider, for example, a situation in which Dassault Aviation engaged in the same business activities—selling its jets to a separate entity that finishes them according to a customer's specifications, and allowing its name to be used by the separate entity in marketing the jets. *Amici* do not believe anyone would seriously argue that Dassault's ties to that separate corporation could lead to the imputation of that corporation's forum contacts to Dassault for purposes of allowing a court to exercise long-arm jurisdiction. It should follow then that the same conduct undertaken through a

subsidiary should lead to the same result—no jurisdiction over the foreign corporation. But the Eighth Circuit effectively penalizes the use of subsidiaries for no legitimate reason.

The Eighth Circuit's approach, if permitted to stand and to influence other courts around the country, would greatly increase a nonresident parent corporation's potential for being sued, thereby increasing the costs of doing business. This could result in severe consequences for business and investment in the United States.

Continued reliance on such an expansive theory would discourage direct foreign investment in Arkansas and in the states of the Eighth Circuit. In deciding whether to do business in Arkansas (or another state in the Eighth Circuit), a foreign parent corporation would now have to factor in the serious possibility that it could be sued in Arkansas for matters unrelated to its own U.S. activities. Instead, corporate groups, or even companies looking to work closely with (unaffiliated) business partners, may well look to nearby states that do not employ such a loose standard.

In addition to the disincentive such an approach would provide for foreign investment in an Eighth Circuit state, its impact could be much broader. Under the Eighth Circuit's theory of *in personam* jurisdiction, multinational companies would face the prospect that any U.S. subsidiary could serve as a conduit for unlimited jurisdiction over the foreign parent—a possibility that may well discourage participation in the U.S. market altogether.[3] According to a recent Department of Commerce survey, in 2002, majority-owned U.S. subsidiaries of foreign corporations employed over 5.4

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[3] The United States has expressed similar concerns in other cases involving the overreaching of general jurisdiction. *See Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 425 n.3 (1984) (Brennan, J., dissenting) (noting the position of the United States regarding the risks of deterring U.S. purchasing by foreign companies).

million workers in the United States, accounting for 4.8 percent of the country's jobs and 11.8 percent of the country's manufacturing jobs. See William J. Zeile, U.S. Dep't of Commerce, *Operations of U.S. Affiliates of Foreign Companies*, 192, 202-03 tbls.5, 6 (Aug. 2004), *available at* http://www.bea.gov/bea/ARTICLES/2004/08August/0804FDIUS.pdf. Threats to beneficial business activity of this magnitude must be taken seriously.

Finally, adopting the Eighth Circuit's novel approach could also lead to serious concerns of international "reciprocity" for U.S. companies doing business abroad through locally incorporated subsidiaries. The Eighth Circuit's lack of restraint in the exercise of jurisdiction could well lead courts of other countries to adopt similarly expansive jurisdictional approaches, to the detriment of U.S. companies doing business abroad through local subsidiaries of their own.

The Eighth Circuit's expansive approach to jurisdiction, therefore, poses risks for the nation's interests as a whole. A uniform rule is needed that provides greater predictability, respects the corporate form as a legitimate means of organizing global business, and respects the appropriate limits of U.S. jurisdiction under the Due Process Clause. Such a rule will only emerge through this Court's prompt intervention.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONSE IN OPPOSITION TO MOTION OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND RESPONSE TO BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

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OCTOBER 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONSE IN OPPOSITION TO MOTION OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND RESPONSE TO BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER 1

A. The Petitioner's *Amici* Misrepresent the Holding of the Eighth Circuit to Mean that the Negligence of a Subsidiary Imputes to the Parent 1

B. The Proposed *Amici* Brief Merely Parrots and Expounds Upon the Argument Which Has Already Been Presented by Petitioner 3

C. The Eighth Circuit's Holding Does Not Amount to "Jurisdictional Overreaching" that "Interferes" with International Commerce Inasmuch as Dassault was Found to Have "Minimum Contacts" with the State of Arkansas 4

CONCLUSION 7

TABLE OF AUTHORITIES

Anderson v. Dassault Aviation,
361 F.3d 449, 454 (8th Cir. Ark. 2004) 4, 5, 6

Asahi Metal Indus. Co. v. Superior Court,
480 U.S. 102 (1987) 3, 4

Burger King Corp. v. Rudzeiwicz,
471 U.S. 462, 105 S. Ct. 2174 (1985) 3, 4

Epps v. Stewart Information Services, Inc.,
327 F.3d 642, 645-7 (8th Cir. 2003) 5

International Shoe Co. v. Washington,
326 U.S. 310, 66 S. Ct. 154 (1945) 2, 3, 4

Milliken v. Meyer,
311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940) 2

United States v. Bestfoods,
524 U.S. 51, 61, 118 S. Ct. 1876, 1884 (1998) 1, 2

STATUTES

42 U.S.C.§ 9601 2

RESPONSE IN OPPOSITION TO MOTION OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND RESPONSE TO BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

Respondent, Beverly Anderson, submits this opposition to the Motion filed on behalf of the Organization for International Investment and the Chamber of Commerce of the United States ("the Chamber") for Leave to File a Brief as *Amici Curiae* on behalf of the Petitioner, Dassault Aviation. Respondent's consent to the present petition was withheld for multiple reasons. First, there is no legitimate interest in protecting an international manufacturer from having to defend its product in a United States courtroom in a state at which the manufacturer has purposefully directed its activities and products, where it has admitted its "presence" is "especially significant," and where its Group's largest production and distribution center is located. Second, the *Amici Curiae* brief does nothing more than to echo the argument of the Petitioner and to regurgitate what has already been averred by Dassault Aviation in its Petition for a Writ of Certiorari. Finally, the Petitioner's *Amici* fail to provide any factual underpinning to their conclusory statement that "confusion" exists in and among the circuits to justify the granting of Dassault's Petition. For these reasons, leave to file an *amicus* brief on behalf of the Petitioner should be denied.

A. The Petitioner's *Amici* Misrepresent the Holding of the Eighth Circuit to Mean that the Negligence of a Subsidiary Imputes to the Parent.

In their effort to overstate the importance of this case, these prospective *Amici* have stated:

> [The Eighth Circuit's approach] deliberately disregards the "general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation...is not liable for the acts of its subsidiaries." [*citing United States v. Bestfoods*, 524 U.S., 51, 61, 118 S.Ct. 1876, 1884 (1998)]. It also ignores the "equally fundamental principle of corporate law," that a subsidiary's corporate veil may be pierced only "when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.*, at 62.

Amici Brief, page 8.

This is totally false. At no point did the Eighth Circuit ever hold that a parent could be held vicariously liable for the negligence of its subsidiary. In fact, at no point in this lawsuit has Respondent ever made the allegation that Dassault Aviation is vicariously liable for any act or omission committed solely by its American agent. Petitioner's *Amici* are suggesting that the same "fundamental principles of corporate law" that govern vicarious liability likewise govern the "minimum contacts" analysis derived from *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945), and its progeny. They do not.

Petitioner's *Amici* cite this Court to its opinion in *Bestfoods, supra,* for the "fundamental principle of corporate law" set forth above. Reliance upon that case is misplaced because it did not involve a jurisdictional analysis, only a question of vicarious liability. In *Bestfoods*, the United States brought an action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) against, *inter alia*, a corporation that was parent to an oil company for reimbursement of costs associated with cleaning up industrial waste generated by a chemical plant. The issue in that case was whether, under CERCLA, a parent corporation was "operating" a facility, and hence, liable within the meaning of 42 U.S.C.§ 9601 *et seq*. Vicarious liability is <u>not</u> an issue in the appeal *sub judice*.

Rather, the issue before the Eighth Circuit below was whether Dassault had sufficient "minimum contacts" with the State of Arkansas such that the maintenance of the suit would not offend traditional notions of fair play and substantial justice. *International Shoe, supra,* 326 U.S. at 316, *quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343 (1940). The "corporate separateness" between Dassault and its American agent is of no import to this issue. The fact that

Dassault was purposefully directing its activities to the forum state through the delivery of an unfinished business jet to its Group's largest American facility makes the Petitioner amenable to suit in Arkansas for actions that arise out of, or relate to, that contact. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) This is settled law, and the notion being advanced by the Petitioner's *Amici* that the Eighth Circuit has violated "fundamental principles of corporate law" is both misleading and fiction, especially when this Court has steadfastly maintained that a foreign manufacturer that is not physically present in the forum state can still be subject to jurisdiction there. Even under the strictest holdings of this Court, it has long been established that a defendant that "purposefully directs" its activities and products toward a forum state must anticipate that it could fairly be called upon to defend its products in that forum. *See, e.g. Burger King, supra,* 471 U.S. at 476-477. This is not new, and in no way alters the "fundamental principles of corporate law" as *Amici* would suggest.

B. The Proposed *Amici* Brief Merely Parrots and Expounds Upon the Argument Which Has Already Been Presented by Petitioner.

The *Amici* of Petitioner do nothing more than to make the same argument that Petitioner has previously made to this Court, only with the added, unsubstantiated claim that the instant cause has a great impact on the state of international commerce. The Motion for Leave to file an *Amicus* Brief should be denied for this reason alone. The Petitioner's *Amici* overstate the importance of this case in much the same way as the Petitioner itself. The Eighth Circuit's opinion below followed the proper standards enunciated by this Court in *International Shoe* and refined in *Burger King* and *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102 (1987). Dassault should not be permitted to avail itself of the benefit of doing business in the State of Arkansas and not be amenable to suit there. No confusion whatsoever emanates from the holding of the Eighth Circuit below.

There is no factual underpinning to the *Amici*'s contention that "confusion" emanates from the Eighth Circuit's ruling below, for reasons which have already been stated in the original brief in opposition to the Petition for a Writ of Certiorari and which will not be repeated here. The Eighth Circuit followed the non-talismaic formula set forth in *International Shoe, Burger King,* and *Asahi* in finding that the "minimum contacts" existed prior to considering "other factors." The *Amici* Petition, like Dassault's Petition, operates under the false assumption that the Eighth Circuit ruled that jurisdiction over Dassault existed by virtue of the mere ownership of its subsidiary. This is inaccurate. The Eighth Circuit found that Dassault, through its own actions and established plan of distribution, had sufficient contacts with the State of Arkansas to warrant the exercise of jurisdiction. *Anderson v. Dassault Aviation,* 361 F.3d 449, 454 (8th Cir. Ark. 2004) ("Dassault Aviation's nexus with Arkansas and the Little Rock completion center goes *well beyond* mere ownership of [a subsidiary's] stock.") (Emphasis added). This can come as no surprise to a manufacturer that has acknowledged that its "'presence' in the United States has been especially significant in the State of Arkansas." *Id.*, at 453.

C. The Eighth Circuit's Holding Does Not Amount to "Jurisdictional Overreaching" that "Interferes" with International Commerce Inasmuch as Dassault was Found to Have "Minimum Contacts" with the State of Arkansas.

In a further attempt to overstate the significance of the Eighth Circuit decision below, the *Amici* are contending that the decision "poses grave threats to the conduct of national and global commerce." They are certainly wrong to reach this conclusion, given the facts upon which they are relying to state it. Specifically, the statement is made upon the inaccurate premise that the Eighth Circuit found jurisdiction to be present "based solely on the forum contacts of [Dassault's] separately incorporated subsidiary[.]" *See Amici Brief,* pg. 7 Furthermore, the *Amici*'s claim is predicated

largely upon the misconception that the Eighth Circuit's opinion "carries serious implications for the operation of normal, run-of-the-mill parent-subsidiary relationships." *Id.*, at 8. A closer look at the opinion disavows any such notion. The Eighth Circuit made clear that the "nexus with Arkansas...goes well beyond mere" parent/subsidiary relationships. *Anderson*, at 454.

Amici's feigned histrionics are a misguided attempt to convince this Court that the scope of the Eighth Circuit's holding goes far beyond the specific facts of the present case, or that it somehow alters the rules relative to the conduct of international business. Much like Petitioner itself, the *Amici* (by taking isolated observations of panel below out of context) are attempting to mislead this Court into thinking that the Eighth Circuit decision can be read to support the proposition that ownership of a subsidiary doing business in the forum state, without more, is enough to justify the exercise of *in personam* jurisdiction over the parent. That is simply not so, and these *Amici* know better. The Eighth Circuit has repeatedly affirmed the rule of law that the activities of a subsidiary in a forum state alone are not sufficient to sustain personal jurisdiction over a parent corporation. *Anderson*, at 452, *citing Epps v. Stewart Information Services, Inc.*, 327 F.3d 642, 645-7 (8th Cir. 2003).

Petitioner's subsidiary is part of an elaborate distribution system that was created by Petitioner for the purpose of completing, distributing and marketing its products in the United States. Arkansas is the major hub for the Dassault Group's business operations in the United States, and the facility in Little Rock is touted by Dassault itself. The Eighth Circuit below noted that:

> The majority of jets sold worldwide by Dassault Aviation fly in and out of Arkansas to be completed to the specifications of customers at the Dassault Aviation Group's largest production site by Dassault Aviation's wholly owned subsidiary and exclusive distributor of business jets in the western hemisphere.

(Emphasis Added) *Anderson*, 361 F.3d at 453.

The Eighth Circuit rejected the idea that Dassault Aviation's established plan of distribution, including distributorship agreements with its subsidiary, was a "regular run-of-the-mill parent-subsidiary relationship," as these *Amici* phrase it. Dassault Falcon Jet is the American*agent* for the Petitioner, with whom the Petitioner collaborates to market and distribute aircraft throughout the United States, its largest market for custom-built business jets.

A manufacturer that has purposefully directed its activities toward the forum, and has acknowledged that its "presence" is "especially significant in the [forum] State of Arkansas," cannot be surprised, let alone "alarmed," under the established holdings of this Court, that personal jurisdiction would be found to exist, especially in a cause of action that arises out of and is related to those activities. That has been the holding the Eighth Circuit, nothing more. The holding is wholly in keeping with even the strictest of opinions by members of this Court, and does not alter the course or conduct of international trade. Therefore, the motion of *Amici*, as well as the petition itself, should be denied.

CONCLUSION

It is clear that the *Amici* are merely parroting what arguments Dassault has already set forth in its Petition for a Writ of Certiorari, many of which are not supported by the record or by the admissions of fact contained therein, and most of which misrepresent the breadth and holding of the Eighth Circuit's opinion below. Leave should not be granted to file an *Amicus* brief. For these reasons, the Motion for Leave to File an *Amicus Curiae* Brief in Support of the Petitioner's Argument should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

DASSAULT AVIATION,

Petitioner,

v.

BEVERLY ANDERSON,

Respondent

CERTIFICATE OF SERVICE

I, Ted Boswell, a member of the Bar of this Court, certify that on this 28th day of October, 2004, I caused to be served by first-class mail, postage prepaid, a copy of the Response in Opposition to Motion of the Organization for International Investment and the Chamber of Commerce of the United States for Leave to File Brief as *Amici Curiae* and Response to Brief of *Amici Curiae* in Support of Petitioner in the above-captioned case on:

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I further certify that all parties required to be served have been served.

Ted Boswell